

STATE OF MICHIGAN

IN THE SIXTH JUDICIAL CIRCUIT COURT, COUNTY OF OAKLAND

THE PEOPLE OF THE STATE OF MICHIGAN,

OAKLAND  
COUNTY

07-214651-FC

Plaintiff,

JUDGE DANIEL P. O'BRIEN  
PEOPLE v. MCBURNEY, STEV

VERSUS -

File No. 2007-214651-FC

STEVEN LINSEY MCBURNEY,

Defendant,

2008 AUG 14 A 11:30 AM  
OAKLAND COUNTY CLERK  
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**TRIAL**

Proceedings had in the above-entitled  
matter, held before the **HONORABLE DANIEL PATRICK**  
**O'BRIEN**, Judge of the Sixth Judicial Circuit Court  
for the County of Oakland, Michigan on Friday,  
February 29<sup>th</sup>, 2008 8<sup>th</sup> day.

APPEARANCES:

SARA POPE-STARNES  
Assistant Prosecuting Attorney

Appearing on behalf of the People

ROBERT WHITE  
Attorney-at-Law

Appearing on behalf of the Defendant

Lynn E. Erickson, Court Reporter, CSR-0188

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6<sup>th</sup> Judicial Circuit Court

County of Oakland, Michigan

Friday, February 29<sup>th</sup>, 2008

(8<sup>th</sup> day)

• \* \*

THE CLERK: All rise. The Honorable Daniel Patrick O'Brien presiding.

THE COURT: Be seated everyone. Thank you.

Go ahead.

THE CLERK: The Court calls People versus Steven McBurney, docket number 2007-2 1 4 6 5 1-FC.

MS. POPE-STARNES: Good morning, your Honor, Sara Pope-Starnes, Assistant Prosecuting Attorney.

THE COURT: Good morning.

MR. WHITE: Robert White, appearing on behalf of the Defendant McBurney.

We are ready.

THE COURT: Thank you, good morning, Are you ready to proceed?

MS. POPE-STARNES: Yes.

MR. WHITE: We are.

THE COURT: Would you bring in the Jury.

THE COURT: So Counsel is aware, I am going to mention to the Jury the importance of being on time. I guess there is one that's been kind of routinely tardy. So I'll just make a -- I won't point it out to the Juror in particular, but just kind of mention it to them. Just so you know what is going on.

(Whereupon the Jury was returned to the courtroom at 9:10 a.m.)

• \* \*

THE CLERK: All rise for the Jury.

THE COURT: Good morning everyone.

THE JURORS EN MASSE: Good morning.

THE COURT: You may all be seated.

How are you feeling back there, Ma'am? Still feeling tough. Okay. Appreciate your perseverance.

Your may all be seated, the record will reflect that the Jury is back, the case has been called and Counsel's names have been noted for the record.

Ladies and Gentlemen, just a brief

thing before we get going, more for the Jury's benefit then for mine, I've kind of got to emphasize the importance of everybody trying to be here on time, and it is not for my sake or for the lawyer's sake, or for the litigant's sake, but rather for the Jury's sake.

If everybody was late from the Jury that is fine, because I'm trying my best to accommodate all of you. But, if some of you not prompt then it kind of is unfair to everybody else. So --- not to mention it is kind of difficult for the litigants and the witnesses and everybody else.

But, if everybody could do your best we are almost getting towards the end. So if everybody could make a concerted effort to get here on time that would be great. Thank you.

Ms. Pope-Starnes.

MS. POPE-STARNES: Your Honor, the People would call Dr. Dragovic to the stand.

THE COURT: Thank you.

Sir, if you would approach this way, please.

I would ask you to face my Clerk and raise your right hand and be sworn.

THE CLERK: Do you swear the testimony you are about to give is the truth, so help you, God?

THE WITNESS: I do.

THE COURT: Thanks. You can have a seat there.

(Whereupon the witness was sworn at 9:10 a.m.)

\* \* \*

**L J U B I S A J O V A N D R A G O V I C**

After having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

**DIRECT EXAMINATION**

**BY MS. POPE-STARNES:**

**Q** Sir, could you please state your name and spell your first and last name for the record.

**A** I am Ljubisa Jovan Dragovic. That's L J U B I S A. My middle J O V A N. Last D R A G O V I C.

**Q** And, can you tell the Jury, please, how you are employed?

A I'm a Forensic Pathologist and a Neuropathologist, and I am employed in the capacity of the Chief Medical Examiner and Chief Forensic Pathologist for the County of Oakland.

Q Dr. Dragovic, where did you attend medical school?

A University of Belgrade in Belgrade. It used to be Yugoslavia, a country that doesn't exist anymore, but the city is still there and the university and the medical school.

Q What year did you graduate from medical school?

A Almost thirty-three (33) years ago. Back in 1975.

Q After completing medical school, what did you do next in the course of your profession?

A I did a rotating internship at the university hospitals there.

I did my compulsory military service there for eleven and a half months, which I worked in the capacity of regimental medical officer.

Then I did some general practice, together with my wife, at a rural town in northeast part of that country at the time.

Then I joined the Department of Pathology at Queen's University in Kingston, Canada and specialized in pathology.

Then I was --- I was certified by the American Board of Pathology Department, taking the specialty exam in anatomical pathology, back in 1982.

Then I continued sub-specializing in Neuropathology there and my senior fellowship year was at the University of Toronto, Toronto, Canada.

Then I got certified in that specialty in the Board of Pathology, that was back in '85.

Then that year we moved to this county, because my wife was recruited by a major hospital system here, and I had no choice but to tag along with the kids and the dog and everybody else.

So, I started working as a consultant for the University downtown, Wayne State University at the division of Biological Psychiatry as a Neuropathology consultant.

And, somehow I got identified as a suitable recipient for an award and this was

Russell S. Fisher Fellowship award that took me to Baltimore, Maryland to special in forensic pathology.

And, there at the Office of the Chief Medical Examiner for the State of Maryland I completed my specialty training in forensic pathology.

And, in the meantime while I was there and took the specialty exam, got certified in that specialty and got recruited to come back to work in Detroit as a forensic pathologist and neuropathologist for the Wayne County Medical Examiner's Office.

And, I started there in 1987, July 1st, 1987. Worked there for about three and a half years serving in different capacities including being acting Chief Medical Examiner there.

And then I was recruited by this County to lead the Medical Examiner's Officer here and I have been working in that capacity this is my eighteenth (18th) year now, seventeen (17) years plus.

Q Now, Dr. Dragovic, can you explain the word 'forensic pathology' for us?

A Yes. Forensic pathologist is a physician that specializes in 'forensic pathology'.

Forensic pathology is 'public' pathology. It is a branch of medicine and pathology that deals with public issues. Word 'forensic' comes from Latin word 'forum', which is a place of public gathering. And a forensic pathologist is one that is designated by virtue his or her functioning and by the general expectations of the public to do the investigation of a death.

Defining the cause of death, that is why someone died and the manner of death that is how that came upon that person. And report it to the public or representatives of the public. For example, Juries and the Court of law.

Q What is a 'neuropathologist'?

A A neuropathologist' is a physician specializing in the area of neuropathology, which is the discipline of understanding of mechanisms of diseases and injuries of the brain, the spinal chord, peripheral nerves, skeletal muscles.

Q Now, Dr. Dragovic, during the course of your duties as the Chief Medical Examiner in Oakland County, approximately how many autopsies do you perform a year?

A That is variable. The figure of the years has varied from about three hundred (300) plus to about a hundred (100), or even less than a hundred (100), in the years that we had full compliment of forensic pathologists, because then I don't have to --- to work as much in the trenches as --- and spend more time to reviewing the materials and overseeing the functioning of the agency as a whole.

Q Okay. In the course of your work as --- do you also conduct autopsies for other counties?

A Oh, we have done on and off over years to inter-governmental contract work for Livingston County and work for Genesee County.

We also take cases per request from any jurisdiction in the State or out of the State. Of course that would be the parties that requested, whether that is government or private entities pay our county for those services. So, that's taxpayer's benefit also.

Q Is it always a Prosecutor's Offices that make those requests of you?

A No, it can be criminal defense attorneys, civil attorneys, depending on the issues involved.

Human rights attorneys, Constitutional lawyers, it really varies from case to case and they know that we are available for those services coast to coast and they send us cases from time to time.

Q Dr. Dragovic, have you ever been qualified as an expert in a Court of Law?

A Yes, Ma'am.

Q Approximately how many times?

A I don't keep track of that, but sometimes it's once a week, once every couple of weeks, other times it might be several times in a given day, depending on how many situations I have to run to court about.

Q And has this been over the course of your --- I think you said eighteen (18) years with the Oakland County Medical Examiner's Office?

A Well, eighteen (18) years with the Oakland County and the years before with Wayne County and another year with the State of Maryland.

Q And, do you know --- can you give us some examples of the different courts that you have been qualified as an expert?

A District Courts, Circuit Courts, Federal Courts, in the State, throughout the State, out the State, east coast, west coast, down southern States, Florida, Alabama, New Mexico, California.

MS. POPE-STARNES: Your Honor, I would ask that this witness be qualified as an expert in forensic pathology and neuropathology.

MR. WHITE: No objection.

HE COURT: So qualified.

THE WITNESS: Thank you, your Honor.

Q **(By Ms. Pope-Starnes, continuing)** Now, Dr. Dragovic, did you have occasion have occasion to perform an autopsy on a little girl by the name of Madison McBurney?

A Yes, Ma'am.

Q Do you recall when it was that you performed that autopsy?

A It was almost a year and a half, a year plus ago.

MR. WHITE: Your Honor, if the good

Doctor is going to review his file, I would ask that he try to testify first and then ---

THE COURT: Sure. Just as a recollection if he needs it.

MS. POPE-STARNES May I approach the witness?

THE COURT: You may.

Q (By Ms. Pope-Starnes, continuing) Dr. Dragovic, I am showing you what has been marked as People's proposed Exhibit Number 17 (indicting).

Do you recognize that, sir?

A Yes, this is a --- Exhibit 17 is a photostatic copy of the original Autopsy Protocol that I issued on Madison Olivia McBurney.

Q Okay. Is this a fair and accurate copy?

A Yes, it is.

Q Okay. And, is this Autopsy Protocol kept in the normal and ordinary course of business of the Oakland County Medical Examiner's Office?

A Yes, it is.

MS. POPE-STARNES: Your Honor, I would move for the admission of People's proposed Exhibit 17 as People's Exhibit 17.

MR. WHITE: May I take one quick look at it?

MS. POPE-STARNES: Yes. I would ask that the record reflect I did show Counsel this Exhibit before we began.

MR. WHITE: She did.

No objections.

THE COURT: So admitted.

Q (By Ms. Pope-Starnes, continuing) Dr. Dragovoc, would your Autopsy Protocol refresh your memory as to --- specifically what dates you conducted the autopsy on Madison McBurney?

A Certainly. And that is why I pulled it out, because I handle hundreds of cases and have no way of remembering the particulars of every single case without refreshing my memory from the records.

Q Do you have a copy of your Autopsy Protocol?

A I have the original Protocol here.

Q I asked you to look at that and read it silently to yourself. After you have had an opportunity to refresh your memory, let me know, please?

A Yes. I have done so.

Q Does that refresh your memory?

A Yes, it does.

Q When did you conduct the autopsy on Madison McBurney?

A I performed the autopsy on the 6<sup>th</sup> day of December, 2006 on the deceased, who was eleven (11) months of age and it started the autopsy at eight forty (8:40) in the morning.

Q And, can you tell the Jury, please, what was the first thing you did when you began to conduct the autopsy of Madison McBurney?

A Examined the outside of the body. Documented the findings from the outside of the body.

And I proceeded opening the body cavities and examining the organs within the body cavities and documenting those as well.

Q What were your external examination, if any?

A The external examination revealed some defects on the scalp.

MR. WHITE: Your Honor, excuse me. I would ask if he not read from his Autopsy. If he needs it to ---

THE COURT REPORTER: (Interposing) I'm sorry, I can't hear you Mr. White.

MR. WHITE: I'm sorry. I'm sorry.

THE COURT REPORTER: We're going to have problem.

MR. WHITE: I'm sorry. I'm sorry. I asked the Doctor if he would not read from his Autopsy, if he needs it to refresh his recollection that he could tell you.

MS. POPE-STARNES: Your Honor, he was not. He had it in his hands and he was looking at the Jury as he was talking, not at the document.

THE COURT: I don't know what he was doing or not doing, but Doctor, if you could just do that to the extent that you can speak from memory do so, and if you can't just notify the Prosecutor and she will tell you what to do.

THE WITNESS: I will, your Honor.

THE COURT: Thank you.

THE WITNESS: Just in general, without looking at the details in the Protocol, there were defects on the scalp, and there was loss of hair from the scalp that was related to the condition. A pre-existing condition of this baby.

There were --- there was some indications of medical treatment rendered, with a catheter being present and the upper part of the right side of the head. And, for the purposes of monitoring the pressure within the head.

And that was basically the extent of the --- of anything of significant on the outside of the body.

The child, I have to refresh my memory about the actual length of the --- of the child's body was twenty-eight (28) inches. And the weight was thirty-two (32) pounds.

**Q (By Ms. Pope-Starnes, continuing)** And, was it a female or male?

**A** This was a male --- I'm sorry, this was a female child, a white female child.

**Q** Based on your education and experience Dr. Dragovic, was her size and weight appropriate for an eleven (11) month old?

**A** Well, without checking the milligrams, I would say yes, it is reflective of the age. But there may be some variation up and down when one

compares the statistically, the majority of children of that age.

Q Can you describe for the Jury the defects of the scalp that you observed?

A The defects in the scalp was there was missing hair, which we refer to as 'alopecia', or baldness, which is focal, or those were areas of missing hair.

And the skin looked like scared skin, but actually the --- these were the incomplete formation of the scalp there as a result of congenital anomaly that the baby had. They are congenital aphasia of the skin.

Q After you completed the external --- excuse me, external examination of Madison's body, can you tell the Jury, please what you did next?

A Then I proceeded in opening the body cavities, and examined the organs within the body cavities, that means the chest and belly cavity, and the head, the cranial cavity.

Examined the brain only after it was prepared for subsequent examination after preparation and fixative, Examined the brain

coverings and photographically documented those findings.

And then examined the bottoms of the eyes and the eye nerve, the 'optic nerve', the second nerve --- second cranial nerves in relation to the findings of the head.

The findings in the head, basically, were reflective of 'old bleed' under the hard coverings of the brain.

Q What is that, Doctor?

A 'Old bleed'.

Q The range, the area that you are talking about where you observed that?

A I'm talking about the space beneath the hard coverings of the brain that we refer to in medicine as 'dura'. 'Dura' meaning the hard membrane.

So there was a remote bleed and then there was a more recent bleed that would have been approximately days or up to a week or so. Just based on gross examination.

Those were --- structures were subsequently prepared in foramen for further

examination and I continued that examination at a later date.

And I examined the brain tissue and the brain coverings as well.

Q Can you explain to the Jury why it is that you have to fixate the brain and do this later examination?

A Sure. The brain tissue is jello-like and it cannot be successfully examined if it is examined fresh. It has to be hardened in order to keep its margins and to offer itself when one cross-sections to check for injury, defect, damage of any type.

So, it is a standard procedure to remove the brain tissue, place it in formaline fixitive. It gets hardened after approximately two or so weeks, whenever it is ready for examination it is examined then and photographically documented.

Q Can you tell the Jury when you conducted that examination of the brain after it had been in the formaline what, if anything, you observed?

A I observed evidence of, as I indicated earlier, the old bleed beneath the dura, beneath the hard

covering and the recent bleed of the hard coverings.

I also observed that the brain was --- I observed early on, during the actual autopsy, the brain was swollen and showed evidence of herniation, which is a phenomena where the brain function is compromised.

The brain becomes swollen and tries to expand within the skull. Since there is no enough space in the skull the brain is forced to seep down through the opening of the skull at the bottom of it.

The crate opening that we refer to as 'foramen magnum', where the brain stem and the spinal chord continues.

So that type of situation creates the compromise of respiratory function and when --- when the person is still alive and generally that is a complication which a person dies unless some medical intervention is implemented.

And this simply happens because there is compromise space over the surface of the brain because there is blood accumulating there pushing on the brain causing this to happen.

As a result of that condition I also found on examination of the brain tissue that there was extensive rotting of the brain tissue. The infarcts that occur as a result of compromised blood flow because of brain swelling, herniations.

Q What is 'infarcts', what does that mean?

A 'Infarct' it means rotten tissue. This is the tissue that is deprived of adequate blood supply and where there is no blood supply any tissue that is deprived of blood supply rots.

Basically falls apart.

Q The term 'necrosis', Dr. Dragovic, what does that mean?

A "Necrosis" is basically rotting.

And, of course, it happens before death, that is how we identify necrosis.

Necrosis does not occur after death. It's a pre-mortive.

Q Did you find evidence of necrosis and infarcts to Madison's brain?

A Yes. Well, necrosis and infarcts is the same except 'infract' is a particular area that is defined. So, whenever we say 'infract' that

means that particular part of that tissue, brain tissue, is necrotic.

Q Can you tell us the 'bleeds' that you are talking about beneath the dura, what portions of the brain did you observe that in?

A It was over the brain, both sides of the brain.

Q Both, 'bi-laterally'?

A Yes, both sides. 'Bi-laterally' is both sides.

Q When you are talking about the word 'organizing' in regards to a 'subdural hemorrhage', or 'hematoma', what does that mean?

A 'Organizing' is the process of healing. Any time an injury to the body takes place, if the body continues to live and it is not eliminated, life is not eliminated by that injury, the body makes every attempt to heal whatever has been injured.

And this organization, any time there is loss of blood within the body, into the body space, the body cavity, there will be an attempt by the body to organize, to wall off that particular area and to absorb that accumulation of blood and take it away because it's

compromising the function of the organ. In this particular case the brain.

So, that's what I mean with 'organization'. Organization starts at the point of injury. The moment the injury is rendered upon any tissue, including brain, the organization begins because the body is trying to fight back. To heal.

When I am talking about 'organizing', I am talking about something that is happening relative to recent injury. Of organizing would be a situation reflective of something that is happening over a period of hours, days, weeks. There is --- in this particular case there had been previous head trauma and previous complete organization underneath both sides of the dura, or about the surface of the brain.

So, there were two distinct processes. One that is remote and was remote and healed over and another one that was recent, that was reflected even occurring over a period of some days.

Q Dr. Dragovic, so do I understand from what you just said, that the old injury, the previous head trauma had completed organization?

A Yes.

MR. WHITE: Objection, your Honor. I object to the leading nature of the question.

THE COURT: Sustain that so you can rephrase, Counsel.

Q **(By Ms. Pope-Starnes, continuing)** Can you tell the Jury whether or not the previous head trauma had completed organization or not?

A Yes, it had. There was evidence of fibrosis, or scarring there, and evidence of --- of massive accumulation of blood pigment that was deposited in between the layers of scar tissue.

Q Will you explain, please, how 'brain swelling' occurs?

A 'Brain swelling' is a vital reaction of the brain. That is the only way the brain reacts to anything that's causing any trouble for the brain.

Whether it's an infection, whether it's trauma, it's a blunt force trauma, a blunt force trauma of bleeding, or simply deprivation

of oxygen supply. The brain is going to --- the tissue gets swollen.

The cells automatically pick up more fluid from the spaces in between them and the brain just gets swollen, increases in size.

That is how the brain reacts anytime it's acutely damaged by any type of force.

Q And, when the swelling incurs, I know you testified how the herniation occurs, but what then is the consequence to the body of the brain herniation?

A Well, the swelling starts at the point the injury is rendered. Just like anything in life, the life forgets, but that swelling may not be manifest immediately. It may take some time. It may take many minutes to hours for the swelling to reach the proportions where the brain does not have any more space within the skull and starts to push it's lower part to seep down through the opening at the base of the skull.

I have a model here if ---

Q A model of ---

A (Interposing) Of a human head.

Q Would that be helpful, Doctor, in explaining this to the Jury?

A I think it is for demonstrative purposes only. This is a simple, not to scale, model of a human

---

MR. WHITE: (Interposing) Just one minute, Doctor.

Judge, could I just push this up so my client and I can see.

THE COURT: You may. Just one second.

MR. WHITE: Thank you.

THE COURT: Yes.

THE WITNESS: As I said, this model is not to scale, but it is for the purpose of illustrating what actually the anatomical relationships are within the head.

We're talking about the cranial cavity, where the brain is contained within. And, what I have been talking about here you have the top of the head (indicating), it is artificially cut out to allow us to look inside.

The tough membrane that we are talking about, the 'dura' is depicted here as this smooth surface over one side of the brain.

It is stripped over the other side and exposes the bone underneath. So, the 'dura' sits tightly adherent to the bone. On top and on the bottom of the skull.

As damage occurs to the blood vessels that are present in that space in between the inter-surface of this tight membrane and the surface of the brain as a result of movement, sudden movement, and displacement the bleeding starts and the blood accumulates in that space.

As a result of that the accumulation of blood, the more blood accumulates the more space is taken and it pushes the brain down (indicating).

The brain, as a result of that gets swollen, tries to expand but it cannot because there is so much space within, within the skull. And, as the brain gets swollen, the top doesn't allow to go anywhere, so it is the bottom, this round hole down here (indicating) in this model that we refer to as foramen magnum.

The brain stem gets connected to the spinal chord through that foramen and goes down in the spinal canal. Because of the seeping of

the soft jelly-like brain, that is swollen, the part that are closest to this anatomical structure, at the bottom of the skull are the parts of the cerebellum. We refer to them as 'cerebellum tonsils' (phonetic), these are little tonsil like, bulb-like structures that are down there next to the brain stem.

As a result of them pushing down on this swollen brain, this mass goes down, pushes at the brain stem (indicating). The push compromises the breathing function and other vital functions because all the vital functions are centered in our brain stem and that will lead to unresponsiveness of the individual.

In the meantime, this --- this whole structure that is gone down is we call a 'herniation', bulging down, because of the squeeze it will become necrotic because of interference of blood supply. So you have complete breakdown.

And, then as a result the swelling of the brain throughout there is going to be

compromised blood supply to the rest of the brain.

So, wherever the pressure is the greatest, the blood vessels will be shut down and compressed and that's why you get, as a result, as a consequence, if a person survives long enough or periods of days, you get necrosis of the brain elsewhere. You get those infarcts that we talked about earlier.

Q What was the condition of Madison's brain stem on your examination?

A The brain stem was necrotic because of the pressure of the swollen brain downward. This whole area inside was necrotic (indicating).

Also the cerebellum was necrotic, completely disintegrate as a result of impaired circulation because of expansion of the brain.

The swelling of the brain as a result of that subdural bleed that occurred as a result of trauma.

Q If the brain stem becomes partially or fully necrotic, what effect does it have on a child's ability to breath?

A Well, if the brain stem is affected extensively the child cannot breath, or no one can breath on their own. They may be artificially kept on the respiratory support for periods of time, but the longer that process the longer the process of dying of the brain tissue while on respirators.

Q Now you testified, Dr. Dragovich that you examined portions of Madison's eye.

A That's correct.

Q Can you explain that, please?

A The eyes are --- the bottoms of the eyes are looked at for evidence of changes, because they are --- they are generally accessible to clinical examination. And those showed hemorrhage.

These hemorrhages in the bottoms of the eyes are the result of this process of massive brain swelling and impaired venous return of the blood flow through the bottom of the eyes and other associated structures, because all of these structures are interconnected with the brain.

Q And that area of the bottom of the eyes, what is that called?

A The innermost layer of the bottom of the eye is 'retina'. And, those are known in medical terminology as 'retinal hemorrhages'.

Q Now, specifically what did you find from your microscopic examination?

A The critical findings in microscopic examination pertain to the aging of --- or establishing the origin, the time of origin of subdural hemorrhages.

And while the recent subdural was days old, with very early attempt to organize there was remote subdural that was present for months, many months. I would say something like three, four months or so. Or beyond.

Q And, when you say 'days old', is that from the time of the autopsy, or from death, or from injury, what are you talking about?

A Time of death, obviously, because 'autopsy' is the examination of the dead body, when death --- when death comes about all the vital reactions stop. So there is no continued healing after death. So, it is from the point in time of someone's death looking backward, retrospectively.

Q Now, Dr. Dragovich, after completing your examination, including neuropathological examination of the brain, did you form a diagnosis or opinion as to what happened to Madison?

A Yes. The cause of death --- I established the cause of death which was blunt trauma of head and complications, because those complications that we talked about occurred as a result of that primary occurrence of injury and the manner of death was homicide, because it is the result --- it was the result, a purposeful act of another person.

That was how death came upon the person.

Q Can you explain to the Jury, please what you mean by 'blunt force trauma'?

A 'Blunt force trauma' is an injury to human body, any part of human body rendered by physical contact with a blunt object.

Now, the blunt object can be a lot of things. It can be a two-by-four (2X4), it can be a lead pipe, it can be a stick, it can be a floor, a wall. It can be a mattress, padded or

unpadded. It can be a carpeted floor, it can be a stairway. It can be part of the vehicle, anything that does not have sharp margins to generate the actual breaking of the integrity of the surface human body is considered a blunt force.

For example, a knife that has one sharp edge and the other pretty wide blunt edge, if someone strikes someone with that blunt edge, it is a blunt force, not sharp force. But, if someone gets his body in contact with that sharp edge that's sharp force.

So, that is the definition of 'blunt force trauma'. Again, trauma result --- injury resulting from contact, physical contact with a surface that doesn't have sharp edges.

Q What happens when there is blunt force trauma to the head?

A Well, when there is blunt force trauma to the head there is head injury. There is injury to the brain, which is the most precious part that we have in our heads, believed to be the most precious part. Is the most vulnerable organ, tissue as one considers blunt force trauma of

head because through the skull, which is the hard covering of the brain and the dura underneath, being the hard membrane, the physical force is transmitted.

It affects the brain in many different ways. It depends on how it is rendered and how it is sustained. And there are numerous ways that the injuries of the head can result in the injury of the brain and numerous ways those can be sustained of course.

Q Now, Dr. Dragovic, in the course of your experience, have you ever seen blunt force trauma to the head when you have done autopsies where there is no external visible damage to the head, like a bruise or a laceration?

A Sure.

Q And, what is a 'skull fracture'?

A A 'skull fracture' is loss of integrity of the bony structure that encloses the brain.

The skull is our bony structure that covers the brain and if there is fracture of the skull, it means there is breakage, physical separation and the loss of continuity of that structure.

Q And, then again, in the course of your experience in conducting autopsies, have you ever found that there is blunt force trauma to the head where there is no skull fracture?

A Sure.

Q Now, what happens when the head and the surface --- the blunt force --- or, excuse me, the blunt surface that the head is striking, what happens if that surface does not yield to the head?

A Well, if the surface does not yield it will bring the head of an individual to stop. And it does so suddenly that's under the proposition that the head is moving.

I mean, you can have all kinds of situations where the head is stationary and it changes completely the outcome and the complications.

However, if the head is a moving object and strikes and unyielding surface, that sudden stop of the head will result in changes within the head itself, because the brain that is within the head is suspended by these hard structures. The dura that we talked about and the skull around it. And the moment the head

stops, the skull will stop at the contact with the unyielding surface. The brain will, because of inertia, and because of that minimal space in between those structures will continue to travel and will bounce back.

As a result of that movement the snap here, that movement, the greater the chance for major damage for the blood vessels on the surface of the brain that inter connect with the dura and the greater the chance for a person to have subdural bleed, or subdural hemorrhage.

Q Do you have a model, or a doll with you today, which you can use as demonstrative evidence to give an example of this to the Jury?

A Yeah. I brought the one that is routinely used by us in our office for reenactments. This is the model of this baby is not to scale. I think it is at least several inches smaller than the -- the decedent in question.

Q And, can you demonstrate for the Jury the process that you just talked about of what occurs when the head strikes a non-moving surface?

A Well, if I can do it on this surface (indicating) first, and then if there is --- maybe I can use the --- I see that there is a crib there.

What we are talking about is the head striking against the unyielding surface. Of course, if this unyielding surface is not padded, if it is hard surface, the metal or hard wood, the impact to the scalp will result in some bruising or even in breaking of the skin, and tearing of the skin of scalp because the blood vessels within are suffering from that impact.

One could actually see evidence of contact, physical contact with an unyielding surface. But if this area is padded (indicating), that means covered by some fluffy material like a chair seat or chair back, when the head impacts that particular structure. The fluffiness of the padding is in so it protects the actual scalp. There is no damage in the skull. There is no damage in the skull, but the head is soft and the continuation of brain's inertial movement and bouncing back is

maintained. And that is why you have that detrimental effect of sudden stalking impacting the surface.

I can probably demonstrate, is this --

MS. POPE-STARNES: (Interposing) May the witness step down, your Honor?

THE COURT: You may.

(Whereupon the witness left the stand.)

\* \* \*

MS. POPE-STARNES: Doctor, this has been admitted as Defense Exhibit J.

Q (By Ms. Pope-Starnes, continuing) Does this Exhibit have the type of padding or surface that you were talking about?

A Yes.

Q And, can you demonstrate to the Jury what you are talking about in reference to, if the hard surface is covered by something?

A Well, either the sides of the crib, sides of the crib or the bottom is padded, but it is obviously a mattress.

The sudden open arresting the size of

the body, arresting the movement of the head, the motion will result in this chain of dynamics within the head that caused damage of the brain, and that can happen like this (indicating), like this (indicating).

Of this much of a distance, which is a foot and a half or so, two feet.

Q Dr. Dragovic, the injuries that you found --- are the injuries that you found on autopsy consistent with the following hypothetical:

Someone taking the child and throwing her from two feet away into a crib and the child hitting her head against the wooden slats of the crib?

A Yes. This what I just demonstrated.

Q Now, Dr. Dragovic, are you familiar with something called 'hip displacia'?

A Yes.

Q Does hip displacia have anything to do with the cause of Madison McBurney's death?

A Well, hip displacia is a physical impediment in a developing child. So, hip displacia to an extent prevent the developing child from being able to ambulate on his or her own.

And, in that fashion hip displacia allows for --- with that handicap, physical handicap that limits the movements of the child under the circumstances.

Q And, are you familiar with 'aplasia cutis congenita'?

A 'Aplasia cutis congenita' is the medical term -- - medical term where the skin is not maintaining complete integrity throughout the body and there are areas that simply, for whatever congenital reason defect, do not allow skin to kind of continue smoothly, but rather show these spots that need to be provoked to heal or --- or impress anyone looking at them as scared areas, which this girl had, I think, three of them over her head and the areas of hair loss. 'Efocal elbisch.'

Q And did that condition in Madison McBurney have anything to do with her cause of death?

A It didn't have anything to do with the cause of death or mechanism of death. It was a finding that had been present ever since the birth of this child.

Q And, are you familiar with some called the 'mersa'?

A I'm sorry?

Q Are you familiar with something called 'mersa'?

A 'Mersa' is a clinical concept of 'methocycline resistant staphococcus'. That's a strain of bugs.

We call them 'bugs' and they are present on the --- in the environment. And it is derived from a clinical concept where you treat any infection by any bacteria, any bug gets into the body and some of them are resistant --- some strains are resistant to certain antibiotics.

And, this particular one is resistant to antibiotic called Methicillin. So that's where the coinage of the --- of that clinical concept is from.

Q Did you find any evidence that Madison had been suffering from mersa?

A There is no --- there was no evidence of infectious process in the body that I could talk about, certainly not the septic process that

would imply some type of antibiotic resistant bug.

Q Now, Dr. Dragovic, when you --- if --- if a body that comes to the Oakland County Medical Examiner's Office is the person who previously had been hospitalized and then taken to the Oakland County Medical Examiner's Office, in part of your investigation into the cause and manner of death, is it a common practice for you to review the hospital medical records?

A Well, sure, it is part of the investigation. An investigation is the process where you sort a lot of things out. You gather investigation from various sources. You gather investigation from the hospital where an individual that has been injured survived for a period of time.

You talk, if you need to, to those doctors. They give you their view of things. You send out the investigators to gather information elsewhere.

You ask about information from some witnesses of a kind and all of that is taken with a grain of salt. Not to diminish the good work people do in places where the medical care

is rendered, but if those people had all the answers then there wouldn't have been a need for that investigation or for an autopsy.

If they knew everything it would have been considered final, and I could happily retire under those circumstances quite frankly. But that does not happen, so it is a painstaking process of sorting out things from beliefs.

Beliefs by police, beliefs by other investigators, police by our investigators from our office that independently gather information. Their impressions, the impressions of the doctors, impressions of the nurses, all kinds of specialists, they have impressions and personal beliefs about things.

Yes, you have to look at all of that you, of course, cannot take that for granted and at it's face value. It is what --- those are the materials that one has to review and to set aside some of the things and to consider some of the information.

Obviously it is important to have some idea about the timeline. We have to know when an individual is admitted to the hospital, when

the individual was first rendered care, when the individual first came under the consideration for being given care or reported as injured. You need that.

But then, what goes through the minds of the great people that keep us alive, in all the area hospitals and throughout the state, is really not so much critical and important for our consideration in our investigation because their business is to keep the people alive, and they may do it with more or less success.

Our business is to provide some real answers about the cause and manner of death, that's our Statutory duty and that's how we go about it. Without trying to put down any other professional, please understand that.

Q All these professionals you talk about, are doctors who make clinical findings, the police officers who do --- who conduct the investigations, after you do an autopsy do you ever find that you disagree with them?

A It's unbelievable how difficult it is to drive back the information from the objective findings from the autopsy, including the evidentiary

photographs into the heads of some of the most esteemed specialists in the field. Sometimes. Not all the times.

But, that is simply because medicine is practiced by human beings, human beings who have their knowledge, their beliefs, their habits, their dogmas, and their egos, just like everybody else.

MR. WHITE: I'm sorry, Doctor, did you say 'dogmas'?

THE WITNESS: 'Dogma' and 'egos'.

MR. WHITE: 'Egos', E G O S, right?

THE WITNESS: Yes.

Q (By Ms. Pope-Starnes, continuing) Now, Dr. Dragovic, do you have an opinion as to whether or not the remote, or chronic, or old subdural hematoma that you observed with Madison McBurney, could have just rebled spontaneously?

A The remote subdurals do not rebleed spontaneously, but they will make the individual who has them as a pre-existing condition more vulnerable to re-injury and a lesser amount of force would result in the same kind of injury simply because they --- there is a change

already in vascularization of the area above the brain, in the hard coverings of the brain, that is already being compromised for the rest of someone's life.

So it is not like an individual without any injury prior to this particular occurrence.

Q Is there anyway for you to measure the amount of force that is needed?

A No. The --- the way to look at it is that the outcome is a reflection of the force. And as I demonstrated there the movement that is fast, that is not the resulting in breaking of every structure in someone's body.

But the snap in this movement, and the relatively short distance that's all it takes. And, again, with a compromised individual, previously compromised individual, because of pre-existing condition it is easier to render this damage by applying less force.

MR. WHITE: I'm sorry, Doctor?

THE WITNESS: By applying less force.

MS. POPE-STARNES: Your Honor, I have

already shown these to Counsel, but for the record, I am showing Counsel People's proposed Exhibits 18 through 24.

THE COURT: Eighteen (18) through what?

MS. POPE-STARNES: Twenty-four (24).

May I approach the witness, your Honor?

THE COURT: You may.

Q (By Ms. Pope-Starnes, continuing) Dr. Dragovic, during the process at autopsy, is it part of your practice to photograph the body?

A Yes.

Q Showing you what has been marked as People's proposed 18 through 24, and ask you if you recognize these?

A Eighteen (18) through 24 Exhibit are part of the evidentiary photographs that were taken during the various phases of examination of the deceased, Madison McBurney.

The Exhibits 18 and 19 were taken at the time --- I mean photos were taken at the time of the actual examination of the body.

The Exhibits 20 through 24 were taken at a subsequent date during the examination of brain tissue and the brain coverings.

Q And, are People's proposed Exhibits 18 through 24, are those photographs a fair and accurate depiction of the body and the brain of Madison McBurney during the initial autopsy and the subsequent examination of the brain?

A Yeah, they are a fair depiction of the parts of the body that are addressed in these photographs. The many other photographs I can tell you there is altogether twenty-three (23) plus images plus the multiple brain images that cover the rest of the body.

But these are --- these are the --- in particular the head, the areas of the head and some areas of the brain tissue.

MS. POPE-STARNES: I would move for the admission of People's proposed 18 through 24 as People's Exhibits 18 through 24.

MR. WHITE: No objection.

THE COURT: Okay.

MS. POPE-STARNES: May we approach, your Honor?

(Whereupon a discussion was held at the Bench, out of the hearing of the Jury and the Court Reporter.)

\* \* \*

THE COURT: We are having some technical difficulties here Ladies and Gentlemen, you can go out for a little while. We'll take a short recess while we try to get that situated.

Please don't talk about the case.

Thanks.

Please rise for the Jury.

(Whereupon the Jury left the courtroom at 10:10 a.m.)

\* \* \*

THE COURT: Thank you. You may all be seated.

The record will reflect that the Jury has been excused.

We want to treat this then as a break.

Deputies, we'll just give you a jingle, okay?

Thanks.

THE CLERK: All rise.

(Whereupon a brief recess was taken.)

\* \* \*

THE COURT: I would note for the record the Defendant is back, parties ready to proceed?

MS. POPE-STARNES: Yes.

THE COURT: All right.

Doctor, when the Jury comes back what I normally remind you in front of them you are still under oath, and required to testify truthfully and honestly.

Thank you.

Jeff, you can bring in the Jury.

(Whereupon the Jury was returned to the courtroom at 10:30 a.m.)

\* \* \*

THE CLERK: All rise for the Jury.

THE COURT: Good morning, again, everyone.

You may all be seated.

The record may reflect that the Jury is back, the case has been called, Counsel's names have been noted.

The Witness is back on the stand.

Doctor, I would remind you you are still under oath required to testify truthfully and honestly.

**L J U B I S A      J O V A N      D R A G O V I C**

**AFTER HAVING BEEN PREVIOUSLY SWORN TO TELL THE TRUTH,  
THE WHOLE TRUTH AND NOTHING BUT THE TRUTH WAS  
EXAMINED AND TESTIFIED FURTHER AS FOLLOWS:**

THE COURT: Miss Pope-Starnes, you may proceed.

**DIRECT EXAMINATION  
(Conintuing)**

**BY MS. POPE-STARNES:**

Q Doctor, I would like to go through the photographs that were admitted into evidence.

MS. POPE-STARNES: May I approach the Witness, your Honor.

THE COURT: You may.

Q **(By Ms. Pope-Starnes, continuing)** And ask you to explain those to the Jury.

I will give you this pointer. Just point it this towards the screen.

First I am going to show you People's Exhibit 18, can you explain that (indicating)?

A Yes. This is the scalp of the child, the Madison McBurney, viewed from above and the back (indicating).

And these are the areas of lack of hair, what we refer to as 'alopecia.'

And these two are the points of scar-like, or actually scar tissue that these reflect of this aplasia cutis congenita', which is the congenital lack of development of skin, better translation (indicating).

Q Now, Dr. Dragovic, I show you People's Exhibit 19, can you explain that for the Jury (indicating)?

A The appearance here is one of the skull without the scalp. The scalp, this is the back part of the skull (indicating), where the scalp is reflected backward and the front part of the skull, which is sectioned through the middle here (indicating), along this line (indicating), and the front part is pulled up there (indicating). The back part is pulled out here (indicating). And it just shows the secreted findings underneath.

There is no particular finding there as it relates to the --- to this skin condition or the lack of hair, or loss of hair.

There is a little dip here (indicating), the catheter that was placed by the hospital people at the time to the front part of the right side of the head to monitor the pressure within the head, in order to try to cope with the brain swelling.

Q Now I'm going to show you People's Exhibit 20, if you would explain this to the Jury, please (indicating)?

A This shows the blood underneath the dura. This is the hard covering, the 'dura' (indicating), which was placed in the formaline together with the brain, and this is the --- the dark material here (indicating) is the blood that is hardened by formaline, and that is the recent infarct.

The remote infarct are those strips there (indicating) and the strip here (indicating), the membrane that is remote 'subdural hemorrhage' that we talked about earlier that occurred months prior to this injury.

Q Now, Doctor, I want to show you People's Exhibit 20, explain this, please (indicating).

THE COURT: Is that the --- maybe I have the numbers wrong.

MS. POPE-STARNES: No, I'll fix it.

Q **(By Ms. Pope-Starnes, continuing)** Well, let's go to 21 (indicating).

A Okay. Exhibit 21 shows the view of the brain from the left side and below (indicating).

And, as you remember, when I displayed on the model the brain stem and the surrounding cerebellum, which in the situation of the brain swelling undergoes necrosis, because of the impaired blood supply.

Everything here, in this picture, (indicating) is necrotic. The cerebellum is necrotic in this area (indicating). The brain stem that is right underneath it is compressed by the cerebellum. And then the larger veins of the surface show clotting because of impaired circulation through the brain.

Basically this --- this child was rendered brain dead as a result of massive brain

swelling and herniation and the circulation and blood supply stopped.

So you see these mottled areas (indicating), which are actually extensive areas of necrosis and infarct. Simply tissue breaking down because there is impaired blood supply.

Q Now, People's Exhibit 22, would you explain that (indicating)?

A Exhibit 22 shows a cross-section of the brain. This is the right half of the brain (indicating), and this is the left half of the brain (indicating).

And these large mottled area show necrosis of the tissue, the infarcts that I talked about earlier (indicating).

Also you can see how there is loss of --- of the form of the convolutions and grooves (indicating), everything is matted together because this is a swollen brain.

Normal brain is nicely outlined convolutions and grooves, is the cortex of the brain. This is lost.

And the distinction between the gray matter and the white matter is lost simply

because of impairments of circulation because of the extreme swelling.

Q Dr. Dragovic, I show you People's Exhibit 23 (indicating), could you explain that?

A This is a cross-section of the brain toward the back part of the brain (indicating), and it shows another large area of necrosis and basically it is the same phenomena with part of the brain stem, upper brain stem and cross-section and shows the extensive mottling of that area because of necrosis (indicating), rotting of the brain stem.

Q I will show you People's Exhibit 24, if you can explain that, please (indicating).

A Of course, in this Exhibit you see both halves of the brain. Toward the back are extensively necrotic and they are falling apart because of these huge infarcts that have resulted from impaired blood supply because of the expanding of the brain, swelling and pressing on the blood vessels.

And the blood vessels collapse and cannot put the blood through.

Q Finally, Dr. Dragovic, can you tell the Jury did you come to an opinion within a reasonable degree of medical certainty about the manner of death?

A Yes. Death is a homicide, because the trauma was rendered by someone else upon this child, and the randomness of this as well.

Q Thank you.

MS. POPE-STARNES: Thank you, Dr. Dragovic, I have no other questions of this witness, your Honor.

THE COURT: Cross-exam.

**CROSS-EXAMINATION**

**BY MR. WHITE:**

Q Doctor.

A Good morning, sir.

Q Good morning.

So the three stages of an autopsy, an autopsy of this type would be, Number one, an External Examination of the body and the head?

A Yes, sir.

Q Number two, an Internal --- actually, let me back up. An examination of the body and head,

internally and externally, a physical examination; isn't that true?

A Yes.

Q Okay.

And, Number two, you have to have your microscopic analysis of the brain and pictures we just saw?

A Correct.

Q Which takes a considerable period of time?

A It takes weeks.

Q Yes.

And, also you gather information from outside sources, such as medical records?

A Yes.

Q Police reports?

A Yes.

Q And, you had, as part of your investigation in this case, the medical records from University of Michigan?

A I believe so.

Q And, you had the police reports from the South Lyon Police Department?

A I believe.

Q And, included in the police reports are statements allegedly made by the accused in this case, Mr. McBurney?

A I think there was some reference to that, too, yes.

Q Okay. It is not your job as Medical Examiner that you go to the scene of the crime, the alleged crime; is that true?

A It depends. If there is something of --- first of all, the scene is still available and preserved and not disturbed and there is a particular matter that needs to be addressed, then I will go to the scene. Or one of my deputies will go to the scene for a correlation of finding other purposes.

Don't go to all the scenes, but every once in a while when there's an opportunity and there is a need to follow up on that, yes, we do go.

Q But, you didn't go to the scene of this, did you?

A That is correct.

Q Okay.

A Because the scene did not exist ---

Q (Interposing) Hold on.

A I'm sorry go ahead.

Q The scene had already been spoiled; isn't that true?

A Well ---

Q (Interposing) It had been altered?

A Altered. Because of the fact that the --- the deceased was not --- had not been deceased at the time and that it was medical intervention rendered or removed from the environment and all kinds of changes that take place in the course of time.

Q Okay. And, it is a fair statement, Doctor, this is the first time that you have seen Madison's crib; isn't that true?

A Yes.

Q Okay. So, it is a fair statement that prior to your autopsy you did not inspect this crib at all?

A That is correct.

Q You didn't inspect the mattress, correct?

A That's correct.

Q You made no tests?

A That's correct.

Q Didn't inspect the crib itself, the outside railings or anything, correct?

A That's correct.

Q For evidence of any kind impact, correct?

A I did not see that crib until this morning.

Q Okay. Thank you.

And, you didn't obtain any other records regarding the child's medical history?

Including birth records, treatment records, things of that nature, pediatrician records?

A To tell you the truth, I'm not sure. I cannot remember off the top of my head. Some of the records might have been included in the materials that are the decedent's.

There is a thick stack of records that is in a separate file, but I don't remember.

Q And, isn't it true, Doctor, that you also didn't review the radiological testing in this case also?

A That's correct. I'm not a radiologist and I find no ---

Q (Interposing) And I don't mean to be rude, if I just ask a question answer it yes or no.

A Sure. No.

Q I know that your propensity to educate is profound, but ---

MS. POPE-STARNES: (Interposing)  
Objection. The commentary is unnecessary, your Honor.

THE COURT: Both of you just ask the question and, Doctor, just answer, okay?

THE WITNESS: Sure, your Honor.

Q **(By Mr. White, continuing)** Now, we can agree, Doctor, your external examination of Madison found a 'Well developed, well nourished eleven (11) month old baby'; true?

A Yes.

Q Okay. And the external examination of the body revealed 'No contusions.' 'Contusions' being bruises; correct?

A That's correct.

Q No 'lacerations'? 'Lacerations' meaning where the skin is compromised; correct?

A Tears.

Q Tears.

A 'Laceration' is tear.

Q Tear. A scrape, a cut, things of that nature?

A A 'scrape' is 'abrasion.'

'Bruise' is 'contusion'.

'Laceration' is tear.

Q Okay. And we didn't find any of those either, did we?

A That's correct, sir.

Q And, it is also true that in your physical examination of the skull, the outside, did not find any bruises or lacerations, or anything of that nature; true?

A That's correct.

Q Okay. Now, the only thing that was, I guess, an abnormal finding you say was her skin condition. The lesions that you pointed out regarding these?

A (Interposing) As far as the outside abnormalities?

Q Yes.

A Yeah, the skin condition and the lack of hair, yes.

Q Okay. I believe you referenced also the entrance of the I C P monitor. There was a catheter that was placed in also?

A That's correct.

Q But, otherwise then that, it was an unremarkable skull, correct? The outside?

A The skull was unremarkable from the outside.

Q And the skin too surrounding the skull?

A The 'scalp'. The skin that surrounds the skull is the scalp.

Q Okay. And, you also examined the neck, too, isn't that right?

A Yes.

Q Okay. You found no damage to the soft tissues of the neck, isn't that true?

A Well, it is true that there was no damage in the upper part of the neck, but it is true that the lower part of the neck and upper part of the mid-back area are contained epidural hemorrhages indicated in my report.

Q But, 'epidural hemorrhages' is caused by the brain swelling, pushing down into ---

A (Interposing) No, no, no, we are not fixing figs with pomegranates here. That's a totally different process.

The epidural hemorrhage that I referred to in my autopsy protocol is the bleeding on the top of the hard covering of the spinal cord, which was also organizing. And that is indicative of blunt trauma to that part of the body.

Of course the trauma to that part of the body is not a lethal condition, but it is indicative of the contact, the blunt contact with some blunt object.

Q Where was that?

A That was --- you check into my autopsy protocol, I'll read it for you. It's in the --- "There is moderate organized epidural bleed . . ."

Oh, I'm sorry, your Honor, on page 3 of 10. Under 'Evidence of Injury.'

"There is moderate organized epidural bleed in the lower cervical and upper thoracic region of the spine."

Q But, we agree Doctor that the soft tissues of the neck, there is no indication of injury; isn't that true?

An indication that that baby was shaken?

A I wouldn't throw papayas into this salad. That has nothing to do with this concept.

I'm talking about --- if you are asking me about soft tissue, you have to be very specific. There is so much soft tissue structure in the neck, except for the actual spine. So spine is the only hard tissue. Everything else, including the covering of the spinal cord and the spinal cord are considered soft tissue.

So, strictly speaking, as I indicated in my protocol, lower part of the neck, the epidural blood accumulation reflects soft tissue.

Upper thoracic, that is upper chest, mid-chest area, upper area of the spine, there showed some epidural bleed. That is indicative of some blunt force rendered to that area of

body. And that is what I am trying to emphasize, nothing beyond that.

Q Was there damage to the soft tissue of the neck, that's what I'm trying to determine?

A I just explained that there was, that this is considered soft tissue of the lower part of the neck.

So, if there is bleeding --- yes, there is. The answer is yes.

Q Now, you examined the skull itself; correct?

A Yes, sir.

Q And, you found no evidence of a fracture?

A That is correct.

Q And, you found no evidence of bruising underneath the skin either, above the skull?

A That's correct.

Q Doctor, will you explain what a 'diffuse axonal injury' is for the Jury?

A A 'diffuse axonal injury' is generally accepted, not correct, though causive of wide spread damage of white matter structures within the brain.

Q Damage to the brain itself?

A I just explained what it is, referring --- pertaining to damage of white matter structures within the brain.

The brain has --- I have to explain this. Consists of the gray matter, which is our cortex and deeply seated gray matter structures.

And then the white matter that is actually the ensheavment of those relays or connections of all the cells in gray matter.

So, when we are talking the 'diffuse axonal injury' we are referring to damage to the white matter structures within the brain. And, the expansion of the brain stem and the spinal cord, of course.

Q And how would such an injury occur?

A Well, there are all kinds of ways to --- physically these are situations where there is strain, and assuring forces during the impact of the head against some unyielding surface will produce damage to the blood vessels and the white matter structures that are altogether and cause tearing in those areas.

As these areas are torn, there will be commensurate dysfunction, neurological

dysfunction in a person. The person may be unconscious, may have some deficits, may survive, they may complicate and die, or whatnot.

Q And, would you compare that to a 'hypoxic ischemic' injury?

A Well, hypoxic ischemic injury is injury that is a result of deprivation of oxygen supply or blood supply.

'Hypoxic' means oxygen is not supplied adequately. 'Ischemic' is the blood vessels are compromised by being compressed. by ripped --- by being ripped, torn, or otherwise compromises that do not deliver the blood to the tissues to the brain.

So, those can be mistaken frequently by some, I am just saying, because practice teaches us every day that people frequently misconceive that these hypoxic ischemic changes are actually evidence so-called a clone of multi-vocal axonal injury types.

Of course, they are not correct, but it takes an autopsy and a careful examination of the brain to sort that out.

So, general clinical assumption is that 'Whatever gives a signal under a particular imaging may be considered as a fusic axonal injury and, of course, you draw it up at this point.

Yes, generally there is a mix-up between those that occur --- damages that occur as a result of oxygen and blood deprivation and those that are the result of actual physical breakdown because of the force applied.

Q And, we have, in Madison's case a swelling of the brain caused by the loss of blood and oxygen; isn't that true?

A No, we have --- it's a simplistic ---

Q (Interposing) Is it true or not, sir?

A Not completely. And ---

Q (Interposing) Is it true or not, sir?

A As I indicated, sir, not completely.

Q Okay.

A And I'm here to tell the truth, the complete truth, remember.

Q I don't have any questions.

A Okay. Thank you.

Q I believe we'll get around to it.

A All right.

Q I don't mean to cut you off.

Now, remember when you testified in this case before and I asked you about 'soft tissue injury to the neck'?

A (No verbal response.)

Q And, I am referring to your testimony in May of 2007?

If I may, I asked you ---

A (Interposing) Can you please quote the page. Sir.?

Q I will do. Page 20 --- excuse me. Page 36.

A My question was:

"And also, I believe your report indicates that there is no soft tissue injuries that you could detect either."

I'm sorry. I'm sorry. I'll read it again.

"And also I believe your report indicates that there is no soft tissue injury that you could detect either, correct?"

Your answer: "That is correct.

Specifically in the neck area."

A That is correct.

Q Your answering --- Your answer is:

"That is correct."

Do you remember your testimony?

A Yes.

Q Okay. Thank you.

Now, when the term 'global hypoxic ischemia' is used, Doctor, would you please tell the Jury what that term means to you?

A 'Global' erroneously pertains to the globe, the planet earth. And it is transposed constant to reference on to the brain, imagining the brain being something akin to a globe and if most of the brain tissue is deprived of oxygen, then you have a so-called quote/unquote clinical term 'global hypoxia' or 'globabl penoxia'.

These are clinical terms, and I try not to dabble into clinical medicine. I try not to render the care of the living. So, I really do not get to use the terminology very much.

Q Did you find 'global hypoxic ischemia' with Madison?

A I wouldn't refer that --- that is not part of my --- my term, my pathology jargon. But, if someone said in clinical setting that they

concluded that this child had 'global ischemia', 'global hypoxia', I don't mean to argue about that with them. I am not trying to hair split the precision terms.

Q Let's talk about the dura --- the 'subdura space.'

It's really --- it's virtual space, is it not?

A That is correct.

Q If only exists insofar as something is inside it, correct?

A Correct.

Q Okay. In fact, in a normal healthy human being, we are not supposed to have anything inside the subdural space?

A That is correct.

Q And, ---

A (Interposing) I mean, there is no space. You said it's virtual. It doesn't --- if one membrane is touching the other membrane and that's it.

Q And, if there is blood in that space it is called a 'subdural hematoma'; correct?

A A 'subdural hematoma' is a term --- is a clinical term means 'accumulation in the particular area.'

'Hematoma' means accumulation of blood. It is a clinical term. We don't call it 'subdural hematoma.'

Q You call is 'subdural hemorrhage'.

A 'Hemorrhage', yeah.

Q So, hemorrhage and hematoma are really a --- it depends on whether you are a clinician or whether you are pathologist.

A Well, yeah. 'Hematoma' is localized accumulation of blood. 'Hemorrhage' is a reflection of the dynamic process where there was damage to the blood vessels as a result of force and there was bleed.

Hemorrhage is a bleed.

Q Okay. But, we can agree, Doctor, that subdural hemorrhages don't necessarily have to occur by force, isn't that true?

A Well, if you give me some examples where they don't occur by force, I will happily agree with you. If you list them.

If you don't, I will have a tendency

not to agree with you.

Q Well, I was trying to remember what you said on direct examination.

A Whatever if you refresh my memory, I can help you with that.

Q You don't remember what you said?

A Sir, I'm coming of age. I'm fifty-seven (57). And I ---

Q (Interposing) How old are you?

A Fifty-seven (57). Getting on to being fifty-eight (58) in June. So, I --- whatever is there on paper I tried to refresh my memory with, I can't keep all the facts of everything in my head, I apologize.

Q The fact that there is blood in the subdural space, doesn't mean that there is intentional injury; isn't that true?

A That's acceptable.

Q Because we can have a breaking of veins causing bleeding in the subdural space caused by purely accidental injury; isn't that correct?

A Sure, I can give you an example. I had an F B I Agent one time that walked down the street,

stepped on a piece fell backward and developed subdural hemorrhage as a result of head trauma.

Yes, that is accidental death. But, you have to have a set of circumstances along with it.

Q Sure. Each case on its merits?

A Absolutely. Each case in death investigation we talking about case specific assessment. There are no approximation. or generalization. or statistical gains.

In clinical medicine people try to make a diagnosis based on general approximation. based on differential diagnosis. In death investigation it's a completely different ballgame. Everything is case specific.

Q So, my next question, and I think you might have already answered it, is trauma is not necessarily the intentional act; true?

A That is correct.

Q Trauma can be --- fall backwards as you just described your F B I Agent.

A Yes.

Q Trauma could be a fall down the stairs?

A Slip on a banana peel on the street, any kind of consideration there, or even some worse object that one can encounter on the street.

Q And, it is certainly helpful in your determination of whether trauma --- trauma --- specifically trauma to the skull, trauma to --- causing subdural hematoma, subdural hemorrhage as to what type of problem it was, whether it was accidental or intentional; correct?

A Well, this is the --- what the purpose of investigation is to establish how that came upon a person. And then obviously with application of autopsy, knowledge of science, and common sense. Don't do anything without common sense.

Q So, that is part of your determination. With that long answer, you can say yes, determine whether it is accidental or intentional, correct?

A I'm trying to clarify some points. Yes.

Q Now, you have made it quite clear on direct examination, Doctor, that Madison had old blood in the subdural space; true?

A That is correct.

Q In fact, blood that was months and months old?

A That is correct.

Q At least three to four months, correct?

A Correct. I --- I have no diagnostic perimeter to age beyond a certain number of months, and we know that this child was eleven (11) months of age.

So, it could have been three or four months, could have been six months prior to her death, it could have been seven months prior to her death.

Q Okay.

A There is no way to tell.

Q But, that blood, that old blood that was in the subdural space, was an abnormal condition that existed within, correct?

A Yes, it was.

Q Okay. And, you are certainly not offering to the Jury any theory of how that blood got there, correct?

A That blood ---

Q (Interposing) Sir, just answer yes or no.

Are you offering to this Jury a theory of how that blood got there, yes or no.

A --- I have not been asked. I have not been asked about any theory.

Q Well, I am asking you now?

A By all means. If you are asking me about how that blood came ---

Q (Interposing) No, I'm --- that's okay.

As part of your Autopsy Protocol, did you make any specific finding of how the old blood, that was in Madison's subdural space, was months and months old, did you make any finding about how it got there?

A Of course --- I know it was by trauma.

Q Did you make any finding?

A I indicated it was remote subdural hemorrhage.

Q That's it, isn't that true?

A Yes. But, it is by trauma. It is the result of trauma.

Q And that trauma, you have no idea how?

A Correct.

Q Whether it was intentional or accidental; isn't that true?

Yes or no, sir?

A Well ---

Q (Interposing) Yes or no?

A No, sir.

Q Okay.

A And I can elaborate.

Q Just answer my questions, okay.

So we certainly didn't see any evidence, old evidence of skull fracture; isn't that true?

A That is correct.

Q We didn't see any old evidence of any kind of bruising anywhere; correct?

A Yes.

Q That were healed on the outside of the body; correct?

A Well, bruises heal on the outside of the body over a period of days, sir. So, I indicated that there was no evidence of trauma.

But you're asking about old trauma now. And you've got to specify what type of age are we talking about.

Are we talking about days, or are we talking about weeks because after a couple of weeks you don't find, everybody here in this room, I believe by now knows that every bruise

heals over a couple of weeks on everybody's surface of the body. That's the point.

Q Okay. Do you want to answer my question now?

MS. POPE-STARNES: I'm going to object to asked and answered. The Doctor has testified at the beginning of his testimony on cross-examination that there were no findings of bruises, or lacerations, or scrapes, or anything to the outside of the body. So this is asked and answered.

THE COURT: Let me hear the question, Mr. White.

Q **(By Mr. White, continuing)** My question is, 'You did not find any evidence of old injury whatsoever on the surface of this child'?

THE COURT: I'll ---

MR. WHITE: (Interposing) Skin.

THE COURT: (Continuing) I'll find that's a different question. I'll allow it.

Q **(By Mr. White, continuing)** Yes or no, sir.

A I do not understand the question, sir?

Q You don't?

A I don't.

Q Okay. Let me rephrase it.

'Isn't it true, Doctor, that you didn't find evidence of any old injury of the child, whether it be days, or months, or any length of time on the outside of this child's body?

A Still not following you. Can you please repeat that question, sir?

Q Isn't it true, Doctor, that you did not find any evidence of old injury on the outside of this child? External examination of this child?

A Again, I ask you to just qualify for me 'old injury'. What --- Okay, if you --- if you --- give me the foundation of what you consider the old injury or we can agree on that it will be easier for everyone to follow.

This way I'm at loss.

THE COURT: I'll permit, even though it was asked and answered before, maybe if you ask the question get rid of the word 'old'.

MR. WHITE: Well, okay. That was my next question.

THE COURT: Go ahead.

Q (By Mr. White, continuing) So, we can assume,

Doctor, since you didn't find any evidence of any injury to the external part of this child there was no evidence of old injury also; isn't that true?

A That's correct.

Q Okay. So, you also didn't find any evidence of old fractures within the body either, any part of the skeleton?

A That is correct.

Q The ribs, arms, legs, any part?

A That is correct.

Q Any evidence of dislocation either, of any part of joints, anything; isn't that ---

A (Interposing) Well, the ---

Q (Interposing) Isn't it true or not, Doctor?

A Not completely, and I have to explain because there was ---

Q (Interposing) Well, Doctor you can explain if someone else asks you the question.

A There was ---

Q (Interposing) Answer yes or no.

Q (Interposing) Isn't it true, Doctor, that you found no evidence of dislocation of this child's joints, bones, anywhere on her body?

THE COURT: Can you answer true or not true?

THE WITNESS: I cannot, your Honor, I have to explain, because this child had hypoglacia, --- displacia of the hip and at certain times the joint can be dislocated and at other times can be back in place.

So, this question yes or no is --- is eliminating this consideration because it was a special consideration that was handicapping this child.

Q **(By Mr. White, continuing)** So, other than the hip displacia?

A Yeah, I agree with everything else, but again, there are exceptions. Sorry.

Q Now, knowing this blood was months and months old, old blood, it was an abnormal condition in Madison's subdural space. You also testified that it was --- it made her more vulnerable to trauma that would induce injuries like she suffered in this case, isn't that true?

A That's correct.

Q Okay. So, it's a fair statement, Doctor, a person who had Madison's condition, the amount

of trauma that would be necessary to activate what was --- happened in this case, the brain swelling, the cycle of the oxygen and blood deprivation, it took less trauma; isn't that true?

A Now you missed there that ---

Q (Interposing) Isn't it true, Doctor?

A It cannot be true the way you put it, sir.

Q Sir, isn't it true --- I will do my best to try to rephrase the question. I would ask you to do your best to try to ---

MS. POPE-STARNES: Objection. He indicated --- based on the way it was asked, now Counsel is arguing with him.

THE COURT: The objection is --- I am not characterizing whether it was arguing or not, but the question was --- the answer was satisfactory. You can rephrase.

Q (By Mr. White, continuing) Isn't it true that the subdural --- chronic subdural hemorrhage that she had made her more vulnerable to even trivial amounts of trauma to cause the injury that presented itself at the hospital on November 30<sup>th</sup>, 2006?

A I did not understand your question, sir because you have to explain what you mean by 'trivial'?

And, ---

Q (Interposing) Well, okay.

You say 'chronic subdural hematoma --- 'hemorrhage' in your words and not spontaneously received; is that your testimony?

A Yes.

Q Okay.. You also said on direct examination that the condition that she had, having the old blood, months and months old in her head, that the amount of trauma made her more vulnerable -- - excuse me, the condition made her vulnerable; correct?

A Yes.

Q Okay. So an otherwise healthy eleven (11) month old versus Madison, it would take less trauma to cause the injuries that she suffered; correct?

A Yes.

Q And I'll fault myself for that, not being precise.

MS. POPE-STARNES: Objection as to the commentary and the narrative.

THE COURT: That's all right. That's all right.

Q (By Mr. White, continuing) Now, the word 'organizing' you --- I think you used it in the sense that once there is trauma to --- and specifically this instance, the brain, immediately the body starts to heal?

A Attempts to, yes.

Q Attempts to heal?

A Yes.

Q So, when we say 'organizing' bi-lateral subdural hemorrhages that means that they are actually trying to heal themselves, correct?

A Yes.

Q Okay. And the 'chronic subdural hematoma' is a --- something that actually can grow inside; isn't that true?

A If we are not talking about that type of finding in this case, and this is mixing mangos with papayas.

Q Sir, I'm asking that --- please, I don't mean to argue with you. I asked you questions and they require yes or no. And, if you can't, then just say no.

A As a neuropathologist I cannot answer this question. You will have to ask the clinician who is dealing with 'chronic subdural hematoma.'

I am dealing here, in this particular case, with remote --- evidence of remote subdural hemorrhage, it is a completely different anatomical entity.

And this game of words does not help.

Q You would ask a neurosurgeon question?

A Yes.

Q A neurosurgeon ---

A (Interposing) To treat --- to treat a person with chronic subdural.

Q A neurosurgeon would have the most experience, the training in making a determination about a chronic subdural hematoma.

MS. POPE-STARNES: Objection, your Honor, it calls for speculation.

MR. WHITE: No it's not.

He's in the medical field.

THE COURT: I'll allow the answer.

THE WITNESS: The neurosurgeon is ---

THE COURT: (Interposing) Doctor --- go ahead with the question.

Q (By Mr. White, continuing) Isn't it true a neurosurgeon would be more appropriate --- appropriately trained, has the experience to make this conclusion?

A Only in the living.

Only in the living it is true. Not in the dead, never in the dead, only in the living.

Q All right. Okay. A neurosurgeon would read the x-rays; correct?

A Um --- well, first of all I've got ---

THE COURT: (Interposing) Can you answer that question?

THE WITNESS: Well, I'm not here to define what a neurosurgeon would do or wouldn't do. A neurosurgeon is not the radiologist, your Honor.

A radiologist reads the x-rays, or would read the x-rays and report to the neurosurgeon.

THE COURT: You can't testify what a neurosurgeon would ---

THE WITNESS: (Interposing) Exactly, your Honor.

I have explained, I hope.

Q (By Mr. White, continuing) You have explained that you can't testify what a neurosurgeon does, is that your testimony?

MS. POPE-STARNES: Objection. It's asked and answered, your Honor.

THE WITNESS: That is ---

THE COURT: (Interposing) We got it. We got it.

Q (By Mr. White, continuing) So, when you said that the old blood, the old subdural hemorrhages actually walled-off the particular blood, I believe that is your words, 'walled-off' that particular blood.

A Yes.

Q Do you remember that testimony?

A No, sir. If you could point to me what we are talking about?

Q It was about forty-five (45) minutes ago.

A What, specifically, are we talking about?

Q The chronic, the old blood that was in Madison's brain the effect it has walling off?

A I did not use that terminology, sir, under such circumstance at all. I was talking about organizing recent blood, and I was talking about

laying of fibrous tissue as --- and accumulation of blood pigment in among those layers as an indicator of remote subdural hemorrhage.

There is no reference in my testimony today about some imaginary 'old blood' that you have come up with. And that may be your idea, but it is not something that was a finding anywhere in this case.

Q Okay. Now, we know, Doctor, that brain swelling is caused by a variety of different mechanisms; true?

A True.

Q True. Trauma, right?

A Yes.

Q Accidental or intentional, correct?

A We investigate the trauma ---

Q (Interposing) Sir ---

A (Continuing) . . . to call it accidental or intentional, or inflicted. Anything trauma, anything, any unfavorable circumstance can react and create brain to react in such a way.

Q It doesn't matter whether it is accidental or intentional?

A True.

Q It is an insult to the brain, causing it to swell?

A Yes

Q Okay. And, I believe you indicated that infection can also cause swelling?

A True.

Q And, certainly a loss of blood, or reduction of blood, a loss of oxygen, or reduction of oxygen can cause swelling also?

A Sure.

Q Now, you didn't make a finding about where the impact occurred, the blunt force; isn't that true?

A That is correct.

Q Okay. So, you are not going to tell the Jury that a specific spot on her head, that you can clearly point to that she suffered blunt force trauma; isn't that true?

A Of course it's true. I did not make any attempt to doing that in the first place.

Q And we certainly --- you're not going to offer to the Jury that Madison hit a particular type of object; isn't that true?

A That is correct. I cannot be certain about the type of object, but I can infer based on my examination experience that it was a padded structure.

Q It was a padded structure? Something like this mattress; correct?

A A mattress or any type of bedding that --- a bedding around the sides of the crib or anything else.

Q Okay. You took your demonstration doll, you threw it on the mattress, didn't you?

A Yeah, I can do that again, if you want.

Q No, no. That's all right.

And you certainly didn't make any findings about the amount of force either, a quantifiable measurement of force; isn't that true?

A That's impossible to do that.

Q Thank you. My next question.

It's impossible isn't it, Doctor?

A That's correct. The --- the ---

Q (Interposing) I'll ask it, just give me a chance.

Because your way of determining  
whether the force is necessary --- strike that.  
Let's try again.

Your way of concluding whether the  
force is sufficient is by the alternative  
outcome that it produced; true?

A That's correct. The damage that there is  
created by.

Q Okay. So, when you make a finding of blunt  
force trauma, you're saying an unknown amount of  
force to a --- not a specific area of skull on a  
surface that you don't know may be padded.

Is that a fair statement?

A I wouldn't use the same style as you did, but  
you're getting somewhere near. Of course, with  
some mischaracterization, but, I can't argue.

Q Okay. So, you didn't find any evidence of wood  
splinters in the scalp; correct?

A At the time --- I remember of never mentioned or  
found in this case, no, sir.

Q Okay. So, . . . and it is not common if the  
blunt force object happens to be of wood, a  
wooden surface, that the wood also gets imbedded

in the skull, or splinters, sometimes microscopic splinters?

A Only --- only if it a particularly loosely put together wooden surface with some inherent defects or some pre-existing rotting in that surface, or something like that.

Where actual physical contact and it creates damage in the surface, but other surfaces do not allow for that, so it's --- it's again case specific.

Q Case specific.

A Yes.

Q And certainly it could happen even on a smooth surface if the force is great enough, correct?

A Depending on the surface, the physical structure of that surface that is impacted, yeah.

Q And, you certainly didn't make any findings on what angle the blunt force trauma was on Madison's head; isn't that true?

A I did not accomplish that based on my professional knowledge and experience. Maybe someone could, but not me. Sorry.

Q Now, knowing that --- found that was trauma that started these events, trauma that was, you

believe, to be within days of your exam? Or a couple of days?

A Within days, about four to six days prior to the actual death, that would be the general range of estimation.

Q That was the precipitating event?

A No, I was talking about the --- based on the microscopic analysis of the subdural --- organizing subdural hemorrhage, my estimation is that the trauma occurred somewhere in the range between four and six days.

Q And, ---

A (Interposing) Plus/minus a day too. I mean, there is --- is also some variation there. It's an estimation. There is no better measure than that, based on tissue changes under the microscope.

Q But, isn't it true, Doctor, though based upon your examination, external, internal, the microscopic analysis, just looking at Madison there is no way that you can determine whether this was done purposeful; isn't that true?

A Well ---

Q (Interposing) Yes or no, please?

A No, sir. Because ---

Q (Interposing) The Doctor just answer it, I'll give you an opportunity.

Without looking at the police report you couldn't tell whether this child fell off a counter; isn't that true, and hit the back of her head?

A No, sir.

Q True or not?

A No, sir.

Q Okay.

A This ---

Q (Interposing) Sir, you couldn't tell whether she was in a motor vehicle accident; isn't that true?

A I think that ---

Q (Interposing) Sir, just answer yes or no.

A I can't answer these questions, because they make no sense, the ---

Q (Interposing) Sir, isn't it true that you could not determine whether this child suffered trauma as a result of accidental means, based upon your examination alone, internal and external?

A No, sir.

Q In fact, you look at the police report --- in fact, these police officers were there during the autopsy, were they not?

A They were.

Q Okay. That's how you formed your conclusions that it was a purposeful act of another; isn't that true?

A No, it is not true, sir.

Q Now, you gave a demonstration and you threw that baby very forcefully into the bed; isn't that true?

A Not particularly forceful?

Q That's not particularly forceful to you?

A No.

Q Okay. And can I see your baby?

A This is a model.

Q A model (indicating).

So, when you threw this model on the mattress you're saying you did not throw it forcefully?

A That is correct.

Q Okay. But, you threw it giving an illustration the type of unyielding object to a force causing trauma, correct?

A Moving head, affecting the unyielding surface.

Q Okay. You don't have any idea how forceful, what measurement of force caused the trauma in this case?

MS. POPE-STARNES: Objection, asked and answered.

MR. WHITE: I didn't ---

MS. POPE-STARNES: (Interposing) He asked him about ten (10) minutes ago if he could measure the force necessary, and he said, 'No.'

MR. WHITE: That was a hypothetical, Judge. This is case specific.

THE COURT: I'll allow, let's move on after that?

THE WITNESS: That's correct.

Q (By Mr. White, continuing) That's correct. So, you don't know if it was like this (indicating), correct?

A (Laughing).

Q Sir, just answer the question.

A Not correct, sir, because ---

Q (Interposing) Sir, just answer the question.

A Not correct.

Q Okay.

And, you don't know --- you certainly didn't know height of person that would do it, correct? Whether the physical characteristics, whether he was tall, short, didn't have any idea of that?

A Those specific information about the individual I did not have. I did have specific information about the baby.

Q About the child?

A That the child ---

Q (Interposing) But the one you said committed the homicide, this is the one that you're saying committed this act, you didn't have any information; isn't that true. Sir?

A Because --- because the condition ---

Q (Interposing) Sir, isn't it true ---

MS. POPE-STARNES: (Interposing) I'm going to object, it is argumentative. It is the People of the State of Michigan that charged the Defendant with the crime.

The Medical Examiner reaches --- his testimony is he reaches an opinion as to the cause and manner of death.

So Counsel is being argumentative.

THE COURT: We --- I've got the answer. The answer has been supplied. He provided the answer.

MR. WHITE: If I may approach?

THE COURT: You may. You may.

Q **(By Mr. White, continuing)** Was Madison a shaken baby?

A I'm sorry?

Q Was Madison a shaken baby?

A I do not use that term, and I did not see any evidence of physical contact that would provide the basis for allegation of violent shaking.

MR. WHITE: One second, Judge?

(Whereupon a brief delay was had.)

\* \* \*

Q **(By Mr. White, continuing)** Now, you know from reviewing the records, Doctor, that Madison was on life-support, true?

A That was my understanding.

Q So, that means that she was not breathing on her own?

A That's correct.

Q Okay. Which, I believe, indicated that it then would --- so the necrosis actually started before death, correct?

A Necrosis do not occur after death, sir. Only -- - it's a phenomenon of life.

Q Oh. Okay. So the necrosis actually started while she was in the hospital?

A Sure.

Q And, do you know how long she was on life-support?

A I believe for the duration, until she was discontinued.

Q But, do you know how long that was, what period of time it was, Doctor?

A I don't have anything specific in front of me. If you show me a document I would read it. Again, I have limited capability of memorizing things that are not, in my mind, relevant to assessment.

Q So we can agree, Doctor, that person, child, eleven (11) month old child with chronic subdural hemorrhage --- if I may use your words --- 'a lesser amount of force is necessary to cause the injury.'

MS. POPE-STARNES: Objection, asked and answered.

MR. WHITE: I used his words, not mine.

MS. POPE-STARNES: And in using his words he's repeating it. He has the answer.

THE COURT: Okay. Do me a favor, ask the question without the break in between and let me hear it. It sounds like it was asked and answered.

MR. WHITE: Okay.

**Q** (By Mr. White, continuing) All right. Isn't it true, a person with chronic subdural hemorrhage it takes a lesser amount of force to cause the injuries that Madison suffered; isn't that true?

MS. POPE-STARNES: Objection. Asked and answered.

THE COURT: Sustained.

MR. WHITE: All right. Thank you.  
I didn't use his words, Judge, I used it hypothetically.

THE COURT: Noted.

**Q** (By Mr. White, continuing) She was a compromised individual; correct?

A Yes.

Q In fact, on slide number 20, I believe you pointed out a chronic subdural hemorrhage, a striking?

A The membrane?

Q Yes.

A Yeah.

Q All right.

I have nothing further at this time.

**REDIRECT EXAMINATION**

**BY MS. POPE-STARNES:**

Q Doctor Dragovic, did you need to inspect the crib to make a determination as to the cause and manner of death of Madison McBurney?

A No.

Q Why not?

A Because the findings in this infant, this is not a child, it is an eleven (11) month old infant that is handicapped and cannot ambulate on its own. Indicative of injury, of infliction.

Had this been a two-year old, two-year old charged with it's hopping off the counter to the chair, to the table left, right and fell as

a result of slipping or tripping, that would have been a totally different consideration.

Q Counsel asked you about whether or not you reviewed and radiology records?

A I did not, Ma'am?

Q Why not?

A Because I am not the radiologist, and I don't dabble in --- in the diagnostic assistant to radiographic shadows. That's what radiologists do and they report it. For the living. For the benefit of the living for the most part.

Q The epidermal hemorrhage that you were referring to in the area of the spine, specifically where was that?

A It was at the bottom of the neck. Actually it was the backbone --- within the backbone, the bottom of the neck and the upper part of the mid-back.

So, this is the spine that is getting from the neck area into the back, upper mid-back. That particular area that curved area of body that is the area that contained organizing epidural hemorrhage, which was indicative of blunt trauma resulting from the contact and some

unyielding surface of that particular part of the body.

Q And then, do I understand correctly that you are saying that it was organizing that that was something more recent in age?

A Yeah, that was approximately the same, if not simultaneous as the subdural hemorrhage that I found over the convexities.

Q In your opinion, Dr. Dragovic, are --- were this infant's injuries as a result of blood and oxygen loss to the brain?

A No, this is --- the blood and oxygen supply that was lost was lost as a consequence of blunt trauma of the head.

The brain reacted to the injury by swelling, and then in that process of reacting it impaired in and of itself the continuation of adequate blood supply.

So, it is what I referred to as blunt force trauma of head and complications. That's the complication, not the originator of this process.

Q When we talk about the remote hemorrhage to this infant, I believe you said that you know that it

was by trauma that it got there, or a result of trauma, can you say what caused that?

A I cannot offer a specific mechanism, but, again, we are dealing with a situation that occurred early on in infancy, where the --- the child would have been even or more limited movement and would be directly dependant to being moved by others, because at the age of four months, five months, the baby does not hop around and does not take a dive out of the crib. It has to be someone moving the baby and taking care of the baby.

That is where common sense comes into picture in addressing any of these problems with positive science information.

Q And in regards to your conclusion that the manner of death in this case was homicide, how did you form a conclusion that this was caused by a purposeful act of another?

A Well, again ---

MR. WHITE: (Interposing) Objection, your Honor. This has been asked and answered on direct.

MS. POPE-STARNES: This was specifically asked by Counsel on cross-examination, and I think I have the right to address it.

THE COURT: It is within the scope of the cross I'll allow it.. Go ahead.

MR. WHITE: I don't know if she has already covered it and I covered it, I don't think --- and again, it has been asked and answered.

THE COURT: Noted. Go ahead.

THE WITNESS: Well, it is a process of consideration and looking, what is reasonable, what is logical and what is not. And, if you exclude the ability of this child to be hopping around and moving on her own, then it had to have been someone else.

And, I don't know who that someone was, because I wasn't there at the time. But, it had to be a grown-up handling this baby.

MS. POPE-STARNES: Thank you, I have no other questions.

**RECORD-EXAMINATION**

**BY MR. WHITE:**

Q Well, Doctor, babies baby fall, right?

A (No verbal response.)

Q Babies fall, say you put a child on a counter and look away and the child falls, correct?

A Well, that's clearly an act of someone else. If they --- if someone else leaves a baby, we're talking about a baby. You claim babies fall. Babies do not fall from the sky. Babies can only fall from areas where improperly, carelessly, negligently placed they can roll off or fall. That constitutes a purposeful act too.

Q So negligence is a purposeful act, in your definition?

MS. POPE-STARNES: I am going to object, he is now asking him to argue about a legal term, your Honor.

MR. WHITE: Judge, Judge ---

THE COURT: (Interposing) Is it --- let --- the Court --- is it a rhetorical question?

MR. WHITE: No, it is not. It's asking ---

THE COURT: (Interposing) As we are --- I'll allow the question and then no more,

because it is getting into legal grounds, but I will allow the question.

Q (By Mr. White, continuing) I'll change the word 'accident'. Okay. Accident.

Well, you're not saying 'accidental' injuries are intentional, are you?

Those terms are not synonymous in your book, are they?

A I don't understand your question, sir.

Q Well, for instance, someone sets a child on a counter, turns away, albeit let's say that poor exercise in parental discretion. Child falls, blunt force trauma to the floor, that is not an intentional, purposeful act in your book, is it?

Yes or no?

A Not necessarily, but we are talking about case specific situation, sir, and ---

Q (Interposing) We're talking about --- we're talking about reading the police report and determining based upon what was said that you were able to determine that it was a purposeful act; isn't that true?

MS. POPE-STARNES: Objection, that goes beyond the scope of redirect.

THE COURT: We're --- go on. Go on.

Q (By Mr. White, continuing) Now this epi ---  
this bleed in the neck.

Now, what you are saying that is  
apparently she must have hit hard enough on the  
mattress to cause this hemorrhaging back here  
(indicating)?

A There was a contact with an unyielding surface.  
How hard enough in your imagination I'm --- I  
apologize, I cannot conform to that. But, I am  
just saying that there is evidence that the  
bottom of the neck, and I can show on you, for  
everyone where the area is so that everybody  
understands, anatomically speaking.

It is clearly an indicator of contact  
with an unyielding surface. And bleeding  
occurring as a result of that.

Q With a padded unyielding surface?

A With a padded unyielding surface, sure, because  
there was no bruise ---

Q (Interposing) Okay.

A . . . outside.

Q So, when the Prosecutor asked you in April of  
this year, on page 34, line 14;

'Doctor, are the injuries that you found on the autopsy consistent with the following hypothetical, someone taking this child and throwing it two feet, from two feet away into a crib and the baby hitting it's head against the wooden slats on the side of the crib?'

Your answer; 'Yes, if it is consistent with that.'

MS. POPE-STARNES: Objection, it's beyond the scope of redirect as well.

MR. WHITE: It is not, Judge.

THE COURT: I'll allow it.

THE WITNESS: Can you point to it again, the page number?

Q (By Mr. White, continuing) Page 34.

A Okay.

Q Line 14.

A Yes, it is consistent with that, it's consistent with --- with exactly what you see right there. It is consistent.

Is it case specific? No, that was not the question, sir.

Q Thank you, Doctor.

A You're welcome, sir.

MR. WHITE: Nothing further.

THE COURT: Anything further?

MS. POPE-STARNES: No.

THE COURT: Thank you, sir, you are all set.

THE WITNESS: Thank you, your Honor.

MS. POPE-STARNES: May he be excused, your Honor.

MR. WHITE: Yes.

THE COURT: Counsel approach.  
Scheduling matters.

(Whereupon a discussion was held at the Bench, out of the hearing of the Jury and the Court Reporter.)

\* \* \*

THE COURT: Ten minutes to. We're pretty close, so we will break for lunch at this time. Please return to the Jury room. Don't talk about the case and in a couple of minutes we'll break for lunch, okay? Thank you.

All rise for the Jury.

(Whereupon the Jury was excused at 11:50 a.m. for the luncheon recess.)

\* \* \*

THE COURT: Thank you, you may all be seated. The record may reflect that the Jury has left the courtroom.

Just keep them back there for a second.

Just keep them back there for a minute.

All right.

Okay. Go ahead.

MS. POPE-STARNES: Your Honor, as I indicated at the Bench, I understood there was a stipulation in regards to the chain of the body itself by Michigan Removal Service from University Hospital to the Oakland County Medical Examiner on December 5<sup>th</sup>, of 2006.

It was my understanding in talking to Counsel before the trial started that they would agree to stipulate to that.

Also, I have now, redacted the language of Battered Child Syndrome, which the Court instructed in People's proposed Exhibit 16, which was the medical records of Nicholas Kennedy from Children's Hospital. And so now I

am going to be moving for the admission of these records.

Counsel indicated at the Bench that there is now a new problem.

THE COURT: What's that, the first leg as to the chain.

MR. WHITE: Stipulated.

THE COURT: Okay. And, the Exhibit that you are referring to Miss Pope-Starnes ---

MS. POPE-STARNES: (Interposing)  
Sixteen (16).

THE COURT: Okay. Just let me catch up to everybody. Hold on.

MS. POPE-STARNES: I don't think you have it in your list yet, Judge. We talked about it.

THE COURT: Well, I put it proposed.

MS. POPE-STARNES: It's not marked yet.

THE COURT: Got ya.

Can I see it while Mr. White is speaking on it?

Do you know what this document is (indicating), Mr. White?

MR. WHITE: Sure.

THE COURT: Go ahead.

MR. WHITE: I didn't see the redacted  
--- I see, I didn't look at it.

THE COURT: Okay. I do admit that I'm  
thinking about something totally different. So,  
bear with me, again.

MR. WHITE: We have the issue of ---  
regarding the U of M records and that one  
sentence which is still not resolved yet.

THE COURT: That's what I was thinking  
we were talking about. Can you help me out one  
more time. What's this document?

MS. POPE-STARNES: Both the Children's  
Hospital and Michigan records for Nicholas  
Kennedy.

And before the trial started Counsel  
objected to the word 'Shaken Baby Syndrome' and  
'Battered Child Syndrome'. And the Court made  
it's ruling that 'Battered Child Syndrome' or  
whatever it was at that point was to be taken  
out, and that Shaken Baby Syndrome could be left  
in.

So, I have redacted that and I want to move for its admission. And Counsel indicated, at the Bench, there was a problem.

THE COURT: Go ahead, Mr. White. I think I have caught up to everybody now.

MR. WHITE: Okay. And it is not a new argument, it is the same argument, but the Court said when we were discussing this, 'shaken' doesn't necessarily mean intentional. That the child could be shaken by other means. It is not necessarily, it is not necessarily mean a not accidental injury.

I think there is a plethora of evidence by all the doctors that the diagnosis of 'Shaken Baby Syndrome' connotes non-accidental injury.

In fact, Alena Dev, in her report, in this particular case says, 'Abusive head trauma paren shaken infant syndrome.'

So, my argument is, Judge, the same, but I believe the facts should help the Court understand that this diagnosis is a medical/legal diagnosis of an intentional act causing injury.

And that would be the same, Judge, as the 'Battered Child Syndrome' that this is a finding of a testimonial nature.

THE COURT: Well, arguably you are asking --- you're moving for reconsideration of the Court's previous decision ---

MR. WHITE: (Interposing) In light of the evidence that has come out.

THE COURT: Go ahead. Miss Pope-Starnes.

MS. POPE-STARNES: Well, the operative word there is 'diagnosis', and these people all talk about it. Not Dr. Dragovic, but the clinicians who treat living people all talk about it as a diagnosis. It is not a legal term.

And I believe that was the Court's Ruling initially was that because it was a diagnosis and not testimonial or a term for court, that that's why it was admissible.

THE COURT: Okay. Anything further.

MR. WHITE: I believe it is a testimonial nature, Judge, under Crawford versus Davis it is a --- it is clear from the testimony

a finding of non-accidental injury. It has been supported by not only testimony. The document -- there is going to be a document that goes right to the Jury that says.

'A head trauma, shaken baby syndrome' and so I ask because this is being offered without opportunity to cross-examine that it be stricken.

Because it also says in there, Judge, there is a medical diagnosis in the proposed Exhibit are clear, you know, bilateral skull fractures, the subdural hematoma, those are medical terms. But, when you make a diagnosis of 'Shaken Baby Syndrome' it is for the purpose of determining child abuse, intentional child abuse.

And, so one who would make that diagnosis would certainly understand there is a possibility of ultimately testifying about it in court.

THE COURT: All right. The Court will accept the stipulation of the parties as to the chain, if that's the proper vernacular, and I

will allow that stipulation to be stated on the record.

With the Court's decision on this other matter, you rest after that; is that correct, or don't know for sure, or what?

MS. POPE-STARNES: Well I guess I have to hear the Court's ruling.

THE COURT: Okay.

MS. POPE-STARNES: Because I have conducted the entire trial on the basis of the Court's initial ruling.

THE COURT: Understood. Understood. Okay. The answer is, 'I don't know yet.' Okay. All right.

It is now five minutes to twelve (12), we are not going to resume in any event and I will take that matter under advisement. We'll resume at one-thirty (1:30) and I will let you know at that time.

Thank you.

THE CLERK: All rise.

(Whereupon the matter was recessed at this time for the luncheon recess.)

\* \* \*

THE CLERK: Calling the case of Steven McBurney, case number 2007-2 1 4 6 5 1 -FC.

THE COURT: Counsel.

MS. POPE-STARNES: Sara Pope-Starnes, Assistant Prosecuting Attorney.

MR. WHITE: Robert White, appearing on behalf of Mr. McBurney.

THE COURT: Thank you. Good afternoon.

And are you ready to proceed now?

Let me first interject. The issue that has --- is pending as proposed Exhibit 16, we'll talk about later on, let's get this witness completed.

MS. POPE-STARNES: I can't rest without knowing ---

THE COURT: (Interposing) I --- anticipating my position, I'm not just stating a question, a statement of fact.

MR. WHITE: So these other Exhibits, we'll just ---

THE COURT: (Interposing) Let's take this witness, let's get accomplished what we can with the witness, okay?

Jeff, bring in the Jury.

THE CLERK: Yes, your Honor.

All rise for the Jury.

(Whereupon the Jury was returned to  
the courtroom at 2:15 p.m.)

\* \* \*

THE COURT: You may be seated.

Afternoon, again, everyone. I'm glad  
that I don't have to say good evening.

Thank you. You may all be seated.

The record will reflect that the Jury  
is back, the case has been called and Counsel's  
names have been noted for the record.

Mr. White, you may proceed with a  
witness.

MR. WHITE: If I may, your Honor, I  
would like to call Dr. Robert Adams to the  
witness stand.

THE COURT: Good afternoon, sir. If  
you would please follow Mr. White up to the  
witness stand.

I would ask you to please raise your  
right hand to be sworn.

THE CLERK: Do you swear that the

testimony you are about to give will be the truth, so help you, God?

THE WITNESS: I do.

THE COURT: Thank you, you may have a seat right there.

R O B E R T   A D A M S

**AFTER HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH,  
THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, WAS  
EXAMINED AND TESTIFIED AS FOLLOWS:**

**DIRECT EXAMINATION**

**BY MR. WHITE:**

Q      Would you please state your full name?

A      Robert Paul Adams.

THE COURT: Would you keep it up, real loud, okay.

THE WITNESS: Robert Paul Adams, M.D.

Q      **(By Mr. White, continuing)** And, Doctor, obviously your profession is that of a physician?

A      Yes.

Q      Okay. And, where did you do your pre-medical education?

A      At the University of Michigan.

Q      And, your medical education?

A Wayne State University in Detroit.

Q And, when did you graduate from medical school?

A In 1982.

Q And, your residency?

A Family Practice at St. John Hospital in Detroit.

Q And your internship?

A Same.

Q Okay. And, how long has it been --- are you Board Certified?

A Yes.

Q And, when did you become Board Certified?

A In 1985.

Q And, what kind of Board Certification do you have?

A American Board of Family Medicine.

Q Are you a member of any professional societies or memberships?

A Michigan State Medical Society.

Q Um --- and, do you have any specific --- any other specific accreditations?

A I'm a Fellow of the American Academy of Family Practice.

Q Um --- have you ever testified before?

A Yes.

Q Have you ever been qualified as an expert?

A No.

Q And your practice is specifically focused on what area?

A Family medicine.

Q Okay. Would you explain what 'Family Medicine' is?

A We take care of people from birth to death, men and women.

MR. WHITE: I move for qualification of Dr. Adams as an expert in the field of Family Medicine?

THE COURT: Miss Pope-Starnes?

MS. POPE-STARNES: No objection.

THE COURT: So qualified.

Q (By Mr. White, continuing) Dr. ---

If I may approach?

THE COURT: You may.

MR. WHITE: Thank you, your Honor.

Q (By Mr. White, continuing) Not looking at this first.

A Yes.

Q Doctor, did you have an occasion to treat a patient known as Madison McBurney?

A Yes.

Q Okay. Did you bring the complete file that you keep in your office regarding Madison McBurney?

A I brought a complete copy.

Q Okay. And, your business is Brighton Family Care?

A Correct.

Q Okay. I have handed you Exhibit BB; is that correct?

THE COURT: Is that 'Boy Boy'?

MR. WHITE: 'Boy Boy', yes.

THE WITNESS: Yes.

Q **(By Mr. White, continuing)** Is that a complete and accurate copy of the file, your medical file that you have kept on your patient Madison McBurney?

A Yes.

MR. WHITE: I move for entry of Exhibit BB.

THE COURT: Any objections?

MS. POPE-STARNES: Just a couple of questions, please?

**VOIR DIRE**

**BY MS. POPE-STARNES:**

Q Doctor, these are the records that you keep in your normal ordinary course of business?

A Yeah.

MS. POPE-STARNES: I have no objection.

THE COURT: So admitted.

Q **(By Mr. White, continuing)** Now, Doctor, now regarding this, do you recall the first time that you saw Madison as a patient?

A Yes.

Q When was that?

A That was a two week well child check, I believe.

Q Okay. And, you said 'a well check-up'?

A Correct.

Q And, would you explain to the Jury what a 'well check-up' is?

A That's a visit that the parents bring the child to make sure that they are developing properly, eating properly, and also often time --- a time when immunizations are given, but not always.

Q Is there a schedule that you have for infants, regarding the frequency of well check-ups?

A Yes.

Q Okay. And, that schedule is what, Doctor?

A      Typically two weeks, one month, two, four, six, nine, twelve (12), fifteen (15), eighteen (18), twenty-four (24), sometimes thirty (30), and then yearly after that. And sometimes they miss or sometimes they come late.

Q      Okay. If you can, tell the Jury do you know the dates of the well check-ups that Madison had?

A      I would have to check the record to see exactly.

Q      Would your records, excuse me proposed Exhibit BB refresh your recollection?

A      Yes.

Q      I would like you to, if you could, look at that and I would ask you the dates of the well check-ups?

Why don't we do a one-by-one, it would probably be easier.

The first?

A      Was a one week check on one three o-six (1/3/06).

Q      Okay. And, how was she doing at that time?

A      There were no problems.

Q      Okay. Next check up?

A      Was a four week check on January 24<sup>th</sup>, 2006.

Q      And how was she doing then?

A She was developing well, and there was some question of a hip-click.

Q Okay. The next check up?

A Was a three month check on March 17<sup>th</sup>, of 2006.

MS. POPE-STARNES: I object, your Honor, and ask he can refresh his memory from the records, but he appears to be reading from the records.

MR. WHITE: Okay.

THE COURT: Direct him, Mr. White.

Q **(By Mr. White, continuing)** And --- okay, we'll do it one-by-one, Doctor.

And, I believe you said March 16<sup>th</sup>?

A March 17<sup>th</sup>.

Q March 17th, I'm sorry.

And do you have independent recollection of how she was doing that day?

A Uh --- there were no visits where there were any problems.

Q Okay. Would --- did Madison's well check-ups follow the schedule that you outlined earlier in your testimony?

A Within reason.

Q Could you tell me, independently, Doctor, without looking at your records when the next check up was?

A No.

Q Would reviewing the records refresh your recollection?

A The next visit was a four month check on May 7<sup>th</sup>.

Q Okay. And, would you particularly remember when the next check up was?

A No.

Q Would your records refresh your recollections?

A Yes.

Q Okay. Will you tell me when the next check up was?

A The next check up was the six month check on July 24<sup>th</sup>.

Q Okay. And, would your memory allow you to remember the next check up?

A No.

Q Would your records refresh that?

A The next visit was a ten (10) month on October 24<sup>th</sup>.

Q Okay. And, do you remember the next check up?

A No.

Q Would reviewing your report or your records refresh your recollection?

A The next visit was a sickness and there were no well child visits after the last one that I mentioned.

Q I'm sorry, October 24<sup>th</sup> was the last well check up?

A Yes.

Q And, the next visit was when, Doctor?

A Was November 3<sup>rd</sup>.

Q Okay. And, if you can recall, do you remember the nature of the sick visit that she had?

A I think it was for a cold.

Q Okay. And, do you remember how she was treated by you?

A Not without looking.

Q Would it refresh you --- would your records refresh your recollection?

A Yes.

She was treated with Amoxicilin and a liquid cold medicine and Tylenol.

Q Okay. And did she have any further visits, Doctor, do you remember?

A No.

Q The last ---

A (Interposing) I misspoke, I do not remember.

Q Okay. Do not remember. Would reviewing your records refresh your recollection?

A Yes.

That was the last visit.

Q Okay. And, at any time, Doctor, that you saw Madison, did you see anything that caused you concern about the way she was being treated away from you?

A No.

Q Okay. Did you see anything that would suggest to you that she was a victim of child abuse?

A No.

Q Do you know, Doctor, from your memory who would bring in Madison?

A The majority of time it was her mother.

Q Okay. Did you ever meet her father?

A I believe on one occasion.

Q As of the last visit, was she up to date on all her vaccinations?

A Yes.

Q Okay. Was --- other than her hip, I think you mentioned, was she growing normally?

A Yes.

Q Okay. Within the range for a child of her age, height, weight, things of that nature?

A Yes.

Q Okay. Any indication that she was not well nourished?

A No.

Q Now, Doctor, was there a time when you were made aware of the results of an August 31<sup>st</sup>, 2006 M R I?

A Yes.

Q Okay. And, how did you become aware of it?

A I received a written report from the University of Michigan.

Q Okay. And, did you discuss that with either of Madison's parents?

A Yes, both.

Q Okay. Both mother and father?

A I believe so, yes.

Q Okay.

MR. WHITE: I have nothing further,  
your Honor.

THE COURT: Cross-examine.

**CROSS-EXAMINATION**

**BY MS. POPE-STARNES:**

Q Good afternoon, Dr. Adams.

A Good afternoon.

Q Let's start with the last question Counsel asked you about the August 31<sup>st</sup>, M R I.

That M R I was done based on a referral that you made, correct?

A Correct.

Q And then you received a report from University of Michigan Hospital from the radiology department in regards to that, correct?

A Yes.

Q Now, you testified that you recall discussing with the parents the results of that M R I, correct?

A Yes.

Q Isn't it true that your records indicate that on September 6<sup>th</sup> of 2006 you had a phone call from the mother and you discussed the M R I with the mother?

A Yes.

Q Okay. When did you speak with both parents?

A Not at the same time, it was sequentially.

Q And, this was a telephone call?

A Both times.

Q So, explain to us how this happened. You get the M R I results and then what happens?

A Then I called the home to talk to either parent, and my staff got mother on line, and I told mother about the M R I.

Q And, then when did you talk to father?

A I believe it was the next day.

Q Okay. Now, you have a note here that says on "September 7<sup>th</sup> R P A wants to talk to M D."

What does 'R P A' stand for in your records?

A Those are my initials.

Q Okay. Where in your notes does it indicate that you talked to father?

A Can I look at the records?

Q Yes, if you can help me, because I am having a hard time reading some of your handwriting.

A On --- at the top of the page dated 9/6/06 in my handwriting there is a --- then a dictation dated 9/6/06 where I spoke to Madison's mother, Heather.

Q Okay.

A And then half way down the page on 9/7/06 is when --- there was a note about a conversation I had with the father.

Q Okay.

A There's a ---

Q (Interposing) So it was on the 7<sup>th</sup> of September?

A Correct.

Q Okay. Now, Doctor, once you got that M R I report, did you have any concerns?

A The M R I was ordered looking for structural problems related to the aphasia acutis and there was a question that there was a lypoma and that is the information that I related to Heather and to her husband.

Q And, it also recommended at C T Scan be done to follow up, correct?

A Correct.

Q And did you do the referral for the follow up C T Scan?

A Yes.

Q And, did you get a report back from the University of Michigan radiology department regarding the follow up C T Scan?

A Yes.

Q Did you have concerns about those results?

A Those results were read as normal.

Q Now, when did you see Madison and treat her for Mersa?

A I did not.

Q When were you advised that she had ever been diagnosed for Mersa?

A I would need to look at the records to answer that question.

Q Would your records refresh your memory?

A Yes.

Q Okay.

A Thank you.

On 11/15/06 we received a phone call from Heather stating that she had seen a dermatologist, her own dermatologist and that dermatologist had done a culture, which showed Mersa.

Q Was the child ever brought back to you after that for a follow up visit in regards to that?

A Regards to the Mersa?

Q Yes?

A There was a referral made to an infectious specialist and I don't believe I saw her for that problem.

Q Okay. Now, tell us, please, what is a 'fontenell'?

A 'Fontenell' is a place --- the skull is made up of multiple different bones, and when you are a child they are not all fused together. And over time the edges fuse together.

A 'Fontenell' is an area where there is a small gap in those bones. There is one in the front and one in the back.

Q Sometimes we refer to that as a 'soft spot', correct?

A Yes.

Q And, during the course of check ups or visits, when an infant is brought to you, is it part of your practice to check the Fontenell?

A Yes.

Q And, why do you do that?

A It gives an indirect measure of pressure in --- within the skull.

Q And, did you do that when you would see Madison for her check ups?

A It is a usual part of the exam.

Q And, did you ever note that there was anything concerning or unusual about her Fontenell during her well baby check ups?

A No.

Q Approximately how many children do you see a year?

A I would have to guess its about a thousand.

Q So, I think it is fair for me to say that in treating that many children a year you probably see children who suffer from the stomach flu?

A Yes.

Q What type of symptoms do you see?

A Vomiting initially and then diarrhea, sometimes fever.

Q Lethargy?

A Not with the stomach flu.

Q When you have a child that it has a fever, do you see lethargy?

A That has a specific medical meaning. We see children who are not as active as usual.

Q Now, I know you said, Doctor, that you saw Madison for one of her well baby visits, I believe, it was on March 17<sup>th</sup>, of 2006, correct?

A Yes.

Q During that visit were you told that Madison had been taken to the emergency room at St. Joseph's Ann Arbor, in February of 2006?

A I don't have any recollection of that.

Q Were you ever given that medical history by the parents in regards to Madison?

A I do not recall hearing it.

Q Okay. How about your records, is that reflected anywhere in your records?

A No.

Q Did you ever receive any type of report or letter from St. Joe's of Ann Arbor in regards to a visit to the emergency room in February of 2006 with Madison?

A No.

Q Were you ever given any history by the parents that Madison had been involved in a car accident during the time she was your patient?

A No.

Q How about did they ever give you any history that she suffered from any type of fall?

A No.

Q Were you ever given any history by the parents that she had suffered from any type of accident?

A No.

Q Now, Dr. Adams, when you get a patient with their first baby and it is one of those very first visits, like the one week or two week visit, do you counsel the parents on how to care for an infant?

A Yes.

Q Talk to them about things like supporting the head?

A Yes.

Q About crib safety, or bed sharing safety issues?

A Sometimes.

Q Would you ever counsel a parent that it is appropriate to throw an infant?

A No.

Q Why not?

A I wouldn't want to have an injury.

Q Dr. Adams, did there come a point where you learned that Madison had been taken to University of Michigan Hospital sometime on November 30<sup>th</sup>, 2006 or thereafter?

A Yes.

Q Okay. And, you actually went to the hospital to see Madison and see the family, correct?

A Yes.

Q Do you recall when you went?

A I would have to refer to my notes, if I could?

Q Okay. Do you think your notes would refresh your memory?

A Yes.

Q Please, go ahead.

A Around the 2<sup>nd</sup> of December.

Q Do you recall when you were there, Dr. Adams, who was there? Who was present?

A Heather.

Q Were there any other times that you were at the hospital to visit Madison?

A Yes.

Q During any of those times did you have an opportunity to speak to Madison's father?

A Once.

Q Do you recall which day that was?

A I don't recall which day.

Q And, during the time that you were there when he was present, did he ever tell you what happened on November 30<sup>th</sup>, 2006?

A No, we didn't talk about that.

Q You only saw the Defendant bring Madison to your office one time, correct?

A That I remember, yes.

Q Dr. Adams, you weren't present on November 30<sup>th</sup> of 2006 in Madison's home, so you don't have any personal knowledge of what happened that day, do you?

A No.

Q In fact, you don't have any personal knowledge of what goes on, or what went on between Madison and her father when they were alone, correct?

A Correct.

MS. POPE-STARNES: Thank you very much, Doctor.

I have no other questions of this witness, your Honor.

THE COURT: Mr. White?

MR. WHITE: I have no other questions.

I ask that the Doctor be excused, just leave behind that Exhibit.

THE WITNESS: Sure.

THE COURT: You're all set.

MR. WHITE: Your Honor, if I may?

THE COURT: You may.

Do you both want to come on up?

(Whereupon a discussion was held at the Bench, out of the hearing of the Jury and the Court Reporter).

\* \* \*

THE COURT: Ladies and Gentlemen, I am going to have you go back to the Jury room for just a couple moments and we will let you know what we are doing from there. Okay.

Please don't talk about the case.

Thank you.

All rise for the Jury.

(Whereupon the Jury left the courtroom at 2:40 p.m.)

\* \* \*

THE COURT: Thank you. You may all be seated. The record will reflect that the Jury has been excused.

I'm just going to stand for a minute, because I'm sore a little bit. Let's stay on the record for a second, Lynn.

It's now, for the record, twenty (20) minutes to three. Depending on the Court Ruling would it --- let me put it this way.

Regardless if the Court made a ruling on the one matter about proposed Exhibit 16, is there anything further that either one of you can anticipate that I can do with respect to the Jury today? Closings or whatever?

The question is whether I'm letting them go or have them come back Monday or not.

MS. POPE-STARNES: What I had left was moving for the admission of the Exhibit in front of the Jury and the stipulation.

THE COURT: Okay. We could have done the stip, but other than that would you --- either one of you, assuming that both of you rested today, would either one of you anticipate going forward with closings today?

MS. POPE-STARNES: No. As I indicated the other day I have other rebuttal witness to Doctor Uscinski's testimony.

THE COURT: Regardless of ---

MS. POPE-STARNES: (Interposing) Who is prepared to come in first thing Monday morning.

THE COURT: So, no matter what, nothing more for the Jury today, other than possibly some stipulations or some rulings on the record?

MR. WHITE: That's correct.

THE COURT: Okay. Is there any --- we can either bring them back in for the one stipulation or make any difference whether it is today or Monday morning?

MR. WHITE: We can tidy it all up on Monday morning.

THE COURT: Okay. Any perspective from you? Other than the comfort of knowing that something more is being accomplished?

Okay. All right.

Now, don't you folks leave yet, we'll allow the Jury to be excused. Tell them thank you, don't discuss the case we'll see them at 8:30 Monday morning.

THE CLERK: Half day?

THE COURT: If they enquire about what is going on just tell them we'll let you know Monday morning.

Okay. Thank you.

I'll have --- I'll be with Counsel in a couple of moments.

We're all set. Thank you, Deputies.

THE DEPUTY: Thank you.

THE CLERK: All rise.

(Whereupon a recess was taken.)

\* \* \*

THE CLERK: Calling People versus McBurney, case number 2007-2 1 4 6 5 1-FC.

THE COURT: Counsel's names --- appearances are noted for the record.

The Court has come back into court. I have been chewing on proposed Exhibit 16 since it was broached before lunch. And I'm --- I'm not going to direct --- I am going to share with Counsel some questions that I have of myself and perhaps Counsel could shed some light on it, perhaps not.

But I'm not --- I'm just sharing some questions. First, the question is did the right to confront witnesses --- strike that.

Did the right to confront the Declarant, who was the author of proposed Exhibit 16, did that right evaporate or was it waived when the Defendant pled no contest? We can take these piecemeal, if anybody wants to respond to it or not. But that's either an actual question directed at Counsel, or it's a rhetorical question.

Anyone?

MR. WHITE: Do you want to do it one-by-one?

THE COURT: However you want. Do you want to speak on it?

MR. WHITE: Sure.

THE COURT: Go ahead.

MR. WHITE: Mr. McBurney pled no contest to Child Abuse Second Degree. Reckless --- recklessly causing serious physical harm to an infant, recklessly causing a --- in fact a negligence or gross negligence standard if I, you know, certainly not intentional.

The difference between that which he pled no contest to and the term 'Shaken Baby' is that shaken baby is meant as a --- it was, and I think its --- I think the Court can glean from the testimony of the doctors in this case, it's being you know shelved, we're putting it as a proper diagnosis.

But, the way it was used then and it was actually used in this case is to connote non-accidental injury. Not accidental.

THE COURT: Let's --- let's for the sake of argument, let's assume that the Declarant is accusing the Defendant. Let's just --- let's just for the sake of argument for this question. My question is does the right to confront witnesses, does the right to confront a testimonial Declarant exist in perpetuity or can that right evaporate or waive?

If he went to trial in front of his accusers, would he still have the right to confront the accusers now. I am using the word 'accusers' loosely. Does that right exist in perpetuity, forever, for future crimes until --- and if in the future he has another child and

this allegation happens again, or does that right evaporate or does he waive that right, or does that right exhaust itself when he does confront them, or waive the right to confront them, by virtue of that adjudication in the no contest in the prior proceeding?

We are not dealing, the accusers --- the Declarant --- when the Declarant was writing down 'Shaken Infant Syndrome', perhaps, just giving the Defendant the benefit of the doubt, that Declarant thought perhaps I can be haled into court. But, at that time he thought he could be haled into court on the Nicholas case. Madison, at the time that the Declarant wrote those words down wasn't even born yet.

So, for that person to anticipate being haled into court in the Prosecution of the Madison case, by definition, he couldn't have anticipated, or the person couldn't have anticipated it.

But that's getting to another question that I have. My first question is whether the right to confront exists in perpetuity?

MR. WHITE: And I say to that, Judge, to the extent that that evidence could ever be used against him it does exist.

THE COURT: Okay.

MR. WHITE: Because if it is going to be evidence against him, then the right of confrontation under the Sixth Amendment would be operative.

THE COURT: I am not saying no, I am not saying yes. That's your comment. I don't think that this was briefed and I don't know if you have any law or if that is just your fundamental Constitutional analysis. Again, I am not saying that these are questions I am soliciting an answer. They are rhetorical questions that are going on in my head. So you can stew on that.

Miss Pope-Starnes, do you want to speak on this?

MS. POPE-STARNES: I think that a person always has a right to confront their accusers. But, I think you don't get to that step in Crawford, because I believe it is not testimony.

THE COURT: Okay. All right. Then we don't need to go further, at least in this case philosophy notwithstanding because there is no dispute as to that --- that leg.

If the --- the question now becomes and by the way, the record should reflect that we are here talking about a matter and the proceeding is Defendant's Motion for Reconsideration of the Court's previous ruling.

So, the basis for the Reconsideration is that there is new evidence, for lack of a better way to put it and that is some evidence on the record.

My question is, what evidence on the record contains a definition of 'Shaken Infant Syndrome' and if there is such a definition on the record, is it undisputed as to what that definition is.

You mentioned Lynn Peterson, I think, but that is the daycare lady.

MR. WHITE: No, I mentioned Dr. Uscinski testified about Shaken Baby Syndrome.

THE COURT: Did he define it?

MR. WHITE: He defined it --- it's his investigation and that his conclusions were that the idea that you could shake an infant so hard, a human being could shake an infant of so many years, taking Madison's years, so hard to cause this rapid acceleration ---

THE COURT: (Interposing) Time out.  
With all due respect, I understand that he testified that a human could not create the force necessary. But that wasn't my question.

The question was did he define the phrase? Perhaps he acknowledged the phrase, but did he define it? Because what we are dealing with here is whether --- in order for it to be testimonial perhaps and add rhetorical comments here, there must be a connotation of an intent, and that was kind of the basis for why the Court allowed it in the first place as opposed to Battered Child Syndrome.

And you are telling me that there is some evidence on the record that now does --- there is some meat in this record. There is some evidence in this record that dispenses with equivocation on how one can interpret that

phrase. And the only definition is an intentional connotation.

MR. WHITE: Dr. Alena Dev testified regarding Shaken Infant Syndrome.

THE COURT: That's who I thought you said Lynn Peterson, Lynn --- Dr. Dev said by definition.

MR. WHITE Yeah, Dr. Dev, and she said it is being replaced, it is now become an anachronistic and it is being replaced by Abusive Head Trauma. And her dep --- and her findings ---

THE COURT: (Interposing) Syndrome or just Abusive Head Trauma?

MR. WHITE: Abusive Head Trauma.

THE COURT: Okay. Go ahead.

MR. WHITE: They love initials A H T. Her --- she says, and it has been admitted in this record, Judge, that the finding was "Madison suffered non-accidental injury, Abusive Head Trauma paren Shaken Infant Syndrome unparens." That's her testimony hi-lighting her written ---

THE COURT: I might have to have you repeat that one more time. 'Non-accidental . . .

MR. WHITE: Injury.

THE COURT: Injury. Keep going.

MR. WHITE: Her findings were that 'Madison suffered non-accidental injury ---

THE COURT (Interposing) A K A --- I don't want to put words in your mouth.

MR. WHITE: N A I. In this case it was Abusive Head Trauma parens --- and I believe it is Shaken Baby Syndrome --- it might be Shaken Infant Syndrome. I can find it in the record.

THE COURT: A K A, formerly known as or something like that, that's what your getting at?

MR. WHITE: She says, 'Abusive Head Trauma parens Shaken Baby Syndrome unparens.

THE COURT: Anything else on it?

MR. WHITE: And she said, when I said that is a term of art that has now been replaced, I said, 'Why did you put it in there?' And she said, 'Just so people know what I'm talking about. That is they are synonymous.

Non-accidental injury, abusive head trauma in this case, the type of non-accidental injury paren Shaken Baby Syndrome.'

THE COURT: While those are three definitions of the same thing?

MR. WHITE: Well non-accidental --- this is a specific kind of non-accidental injury, which is the head, injury to the head.

THE COURT: Okay. So, non-accidental injury is the big is the --- the big circle and within it is Abusive Head Trauma slash Shaken Baby Syndrome?

MR. WHITE: Right.

THE COURT: Miss Pope-Starnes.

MS. POPE-STARNES: Well, that's not what the record says. It doesn't say 'non-accidental trauma'. It says, ---

MR. WHITE: (Interposing) I said her testimony says is is not accidental.

MS. POPE-STARNES: It says, ---

THE COURT: (Interposing) Go ahead.

MS. POPE-STARNES: 'It should be noted her C T and M R I findings are highly concerning for Abusive Head Trauma parentheses Shaken Baby

Syndrome given the retinal hemorrhages and subdural hemorrhages.'

THE COURT: That is a --- you're reading from an Exhibit?

MS. POPE-STARNES: Yes.

THE COURT: It's from People's Exhibit 1. It's from Dr. Dev's report.

THE COURT: And, do you have any --- is it okay if the Court receives that information as well?

Do you have anything to say in response to his contention that the testimony, the other meat of evidence in this record provides for a --- what he said? That he said that she ---

MS. POPE-STARNES: (Interposing)  
First of all ---

THE COURT: (Interposing) Go ahead.  
MS. POPE-STARNES: (Continuing) . . . I completely disagree that Dr. Uscinski gave a definition. In fact, Dr. Uscinski doesn't believe there is such a thing as Shaken Baby Syndrome.

THE COURT: Well, we're getting into the same thing I said before. We're dealing with --- now we just morphed from a definition of the phrase to the consequences from the phrase. So, I don't want to ---

MS. POPE-STARNES: (Interposing)

Well, I think what Dr. Dev in this case she talked about Abusive Head Trauma, she talked about non-accidental injury, she talked about the specifics in regards to Madison and her diagnosis of Madison.

And she was asked by Counsel on Cross-Examination about Shaken Baby Syndrome, and she said, 'It's a term that they used to use, that they were moving away from and that she put it in her report. She didn't give a definition of Shaken Baby Syndrome.

And Abuse Head Trauma, quite frankly, has a different definition than Shaken Baby Syndrome, but I don't believe that is in the record.

THE COURT: Okay. Now, the Court has another question, assuming, for the sake of argument that there is some evidence on this

record that defines Shaken Infant, which is the phrase in the proposed Exhibit, if there is some evidence, some evidence in the record that defines the Shaken Infant Syndrome with an intentional characteristic.

The question is, is that statement in the Exhibit --- was it made by an objective Declarant and was it made under circumstances which would lead the Declarant to believe that the statement would be available for later use in a prosecution of the Defendant for an alleged offense at the time that the declaration --- at the time of declaration the offense did not yet occur?

I'm getting too cumbersome. There has been no argument that the right to confront exists independent of a no contest plea. So, let me restate it. Was that phrase made by an objective declarant and was it made under circumstances which would lead that declarant to believe that the statement would be later use in a trial?

MS. POPE-STARNES: Your Honor, it was a discharge --- discharge summary from a

hospital. It is done every time a patient is discharged from a hospital.

Now, I suppose you could argue that anything could be used in court at some point. But, the purpose of a discharge summary is to say that this is what your diagnosis was, these are the follow up recommendations whether it is to see another physician, whatever. But it was on a discharge summary.

And --- and there was a case that we cited in our original brief about this ---

THE COURT: (Interposing) Is that the Indiana case?

MS. POPE-STARNES: No. It's People versus Miller. It's unpublished. But I attached it to our initial brief in regards to this issue because it has to do where --- it has to do where a neuropathologist relies on other neuropathologist's report.

And, I mean, you could argue that neuropathologist there's a death, that maybe this is going to come in to court. I --- but the purpose of the doing it has to do with the cause, to find the cause and manner of death.

And the Court of Appeals said in that case 'A report completed by one pathologist at the request of another for investigative purposes of determining victim's cause of death is clearly not testimonial.'

And it talks about the definition of testimonial evidence applies to evidence by custodial examinations, prior ex-parte testimony of witnesses, depositions, confessions, statements of an official nature that resemble testimony.

And it says, 'An autopsy report documenting the doctor's medical observation clearly does not meet this definition.' And it says right on this discharge sheet 'diagnosis'. I think it says primary diagnosis, secondary diagnosis, diagnoses.

And when I asked the witnesses the questions about this during the trial I said, 'What was your diagnosis?' They are doctors. They are called upon to treat the living as Dr. Dragovic was saying today and they make a diagnosis in an attempt to do that. And that was the purpose of that discharge summary.

THE COURT: Mr. White?

MR. WHITE: Well, they had nothing to do with the discharge summary in this case. That was the Nicholas case we're dealing with right?

THE COURT: Okay.

MR. WHITE: We've had no doctors testify about Nicholas' case.

MS. POPE-STARNES: I'm sorry. I'm talking about the discharge summary for Nicholas.

MR. WHITE: I misunderstood. I thought you were talking about the doctors in this ---

THE COURT: Okay.

MR. WHITE: Testifying about Nicholas.

THE COURT: Question --- go ahead, speak.

MR. WHITE: It's, you know, there are clearly there are clearly medical terms. Subdural hemorrhage, skull fracture, you know, things of that --- and those are contained within the diagnosis. Okay?

But ---

THE COURT: Along with this ---

MR. WHITE: Along with this Shaken Baby/Shaken Infant Syndrome. And the rest of the medical records, you know, show that there was this belief that the child suffered with Shaken Infant Syndrome indicative of non-accidental injuries. Non-accidental, okay.

And so there was the thirty-two hundred (3200) report to C P S, police, you know. You know that what happened to Nicholas' case. So, it is put in the medical diagnosis, but it has legal termination --- it has legal implication because it suggests intentional injury.

THE COURT: Can you harness that thought for a moment, and if you need to come back to it you may.

MR. WHITE: Okay.

THE COURT: But it is peripherally related to my first question. Would --- was it made by an objective declarant, and was it made under circumstances that would lead the declarant to believe that the statement would be available for later use in a trial?

MR. WHITE: My suggestion --- my response would be to that, Judge, yes it would be because, Number 1 there had already been a referral for, you know, the mandatory reporting law of Michigan that there is suspected child abuse. And the child abuse in Nicholas' case, the suspected child abuse was Shaken Baby Syndrome.

So, for that declarant, the final --- to put in the final diagnosis knowing that there had already been a Child Protective Services referral, knowing that there had already actually, according to Detective Sumner, he had reported that the father confessed, that I don't think it is too difficult to fathom that when that person put that down, whoever that person is, to say that they may be testifying someday about this particular finding, I think it is well within the reason --- of the bounds of reason.

THE COURT: With that in mind, now, Mr. White consider the effect of the sentence in Crawford, which discusses the historical hearsay exceptions which, quote,

"By their very nature were not  
testimonial hyphen for example, business  
records . . . dot, dot, dot, close quote."

Are you following what I am saying?

MR. WHITE: Sure. Sure. And  
absolutely, business records. But in --- I  
agree, normally these medical records slash  
business records, there was a Hearsay Exception,  
there still is.

What does Crawford say? Crawford  
says,

"The right of confrontation under the  
Sixth Amendment addresses those things in  
testimonial nature."

THE COURT: In context, though, this  
language that is excerpted from the majority  
opinion is --- I'm not going to belabor the  
record with my Interpretation of what it means,  
but that's what the opinion was all --- was, in  
part, about. It was saying certain hearsay  
exceptions didn't implicate the confrontation  
clause, because they were not testimonial ---  
not testimonial by their very nature.

For example, business records. So from that sentence it almost sounds like the Supreme Court is saying business records aren't testimonial. I am not saying that it is making that statement, but it's --- it's --- it says what it says.

MR. WHITE: Well, for instance ---

THE COURT: (Interposing) And it was contemplating the eclipse of the confrontation clause over hearsay exceptions. But, it says, "There are certain hearsay exceptions that don't even get eclipsed by the confrontation clause because they are not a testimonial."

MR. WHITE: But, I don't think, Judge, that is an interpretation of the decision in Crawford that comports with the Sixth Amendment because, for instance, the medical records, the complete medical file of Nicholas also contains nurses notes that says the father confessed, okay?

It --- that argument of Crawford says, 'Well, because it's medical slash business records it doesn't matter, it still comes in.'

Okay?

And so we --- you could, you know, extrapolate that to a degree, that you know, you could have lots of statements an incriminating statement by the accused, supposedly, or something or someone else saying something. An independent outside witness statement being put in medical records that because they are medical records I still don't think --- I still think you have to look at testimonial content of that which is being objected to. Regardless of the type of records that are.

THE COURT: Anything further?

MR. WHITE: Nothing further from me, Judge.

THE COURT: The Court is here and considering this request, Motion for Reconsideration. The Court will dispense with the normal requirement that the Order be reduced to a written form before the Court can rule on Reconsiderations since we are in the middle of a trial and that would certainly be unfair to make that requirement and I'll waive that requirement.

Giving the benefit of the doubt and without reviewing the testimony, the Court will assume that Dr. Dev testified, as the Defendant states, that, along with her medical records that do not connote a necessarily contentious component to the phrase 'Shaken Infant Syndrome' then as it relates to the phrase 'Shaken Infant Syndrome' the record is in the same state that it was in when the Court made it's initial ruling, striking 'Battered' --- the word, the phrase containing the 'Battered' word and leaving the phrase containing the 'Shaken' word.

The intent behind it, under this record may include 'intentional' and may include 'accidental' and, indeed, the evidence the Court finds was made for medical diagnosis and treatment and was, for those reasons, plural not testimonial. And the Court, therefore, will ratify its earlier decision allowing the phrase in the Exhibit 16.

Mr. White, your objection is certainly noted for the record. It is very clear on the record.

MR. WHITE: Thank you.

THE COURT: And, other than that, is that Exhibit otherwise okay to come in?

MR. WHITE: May I take a quick look at it?

MS. POPE-STARNES: I redacted it, the other part as ordered by the Court before the trial started. I gave it to Counsel this morning to look at.

THE COURT: Okay.

Just off the record.

(Whereupon an off the record discussion was had.)

\* \* \*

THE COURT: As to Exhibit --- proposed Exhibit 16?

MR. WHITE: I have reviewed it, Judge, and it is in accordance with the Court's ruling.

THE COURT: Then we'll --- I didn't admit that in front of the Jury, we have to do that.

MS. POPE-STARNES: No.

THE COURT: And the stipulation.  
Okay.

What else?

MS. POPE-STARNES: The Jury

Instructions, we went through them and sorted what we agreed on and what we disagreed on.

THE COURT: Okay.

MR. WHITE: Can I just deal with Exhibits, though?

THE COURT: Go ahead.

MR. WHITE: Exhibit Y, Washtenaw/Livingston County EMS run. It is not in the University of Michigan reports. It was admitted through Matt Calus.

I think sister-Counsel's objection it may be cumulative.

MS. POPE-STARNES If I may, Judge? I'll just agree to all these things, okay?

MR. WHITE: Y ---

MS. POPE-STARNES: (Interposing) He has shown me everything, I've looked at it and I have no objection to it's admission.

MR. WHITE: Y --- Z is the Certified Records of Brighton Dermatology, Dr. Liftkin.

A A is Certified copy of Dr. Piro's medical records.

THE COURT: There being no objections  
Exhibits Y, Z and A A are admitted.

THE COURT: All right.

MR. WHITE: And then I put the Court  
on notice, I want to search for some authority  
over the weekend about blowing up the Exhibits  
that were admitted through Dr. Uscinski, the M R  
I and C T Scans.

We were able to print out clear  
pictures, and I know the Court, they have the  
discs as part of Exhibit 1, but they won't have  
the means to access the information contained  
thereon.

So, my intention is to offer as  
replacement Exhibits, hopefully on Monday the  
blown up versions of Exhibit W, --- I'm sorry, I  
am going to back it up. Exhibit T, Exhibit U,  
Exhibit W and X.

THE COURT: You have any comment on  
that, or just wait and see if he has authority  
or just ---

MS. POPE-STARNES: We'll just see.

THE COURT: That covers it from your  
end?

MR. WHITE: It does, Judge.

THE COURT: All right.

Sorry, Lynn, but just so we don't have any confusion, the Court in this session the Court has made its decision on Defendant's Motion for Reconsideration and for the reasons stated on the record admitted Exhibit 16, which, again, I will entrust to Counsel that they will remind me to do it in front of the Jury.

I have also confirmed the stipulation on chain of custody, which will likewise Counsel will remind me and that will be expressed in front of the Jury.

There has been the admission of Exhibits Y, Z and A A.

The Exhibit 1, the remedial words as to the portion of Exhibit 1 has been remedied, though Counsel's fixed the type face with a font themselves and shared it with each other.

And with that, and after the admission or these things are occurring in front of the Jury, does anyone know about resting or not resting or what's ---

MS. POPE-STARNES: Well, I would rest and then as I told the Court, I may have a rebuttal witness.

THE COURT: Oh, I forgot, yeah.

And, Mr. White?

MR. WHITE: In light of her resting, I would rest also.

THE COURT: Okay. And, we can do all that Monday morning and then we'll proceed with the rebuttal witness.

On Instructions I understand that there is a pile that are agreed to and respective pile that you already disagree to or you don't know yet?

MS. POPE-STARNES: There are --- the majority of them we disagree on and then there are one or two --- there is the expert witness one, where we have to fill in everyone now. You know, complete that with the Court.

And there is a couple that depend on the Court's ruling on the ones we disagree on. For example, the Verdict Form and the Instruction to the Jury about their order of deliberations. Once the Court has ruled and we

know specifically what charges are going to the Jury, then we just finished that.

THE COURT: Can we accomplish any of that right now so we don't have to --- in fact, they are coming in at 8:30 on Monday. Is --- are you both ready to discuss that right now?

MR. WHITE: Um ---

MS. POPE-STARNES: I am.

MR. WHITE: I am exhausted. I fear the quality of my argument is going to be diluted and the issues regarding the Jury Instructions are substantive and I believe the time would be better spent. I do believe if we could have all argument and rulings done by, you know, before lunch break so that Tuesday morning we are able to argue.

THE COURT: Well ---

MR. WHITE: (Interposing) Or ---

Go ahead.

THE COURT: I forgot. The rebuttal witness will occur Monday, is that what they --- okay.

Is it anticipated to do the  
Instructions on Tuesday, to read the  
Instructions Tuesday morning?

MS. POPE-STARNES: Following closings,  
your Honor.

THE COURT: But, when would closing --  
- when is that anticipated?

MS. POPE-STARNES: Tuesday morning.

THE COURT: Tuesday morning?

MR. WHITE: Yes.

THE COURT: Okay.

MR. WHITE: I guess --- my  
thought --- I guess we were all working with the  
idea that Tuesday morning would be up and going  
with closing arguments and Instructions.

THE COURT: Yeah, right.

MS. POPE-STARNES: If you will recall  
we talked about --- we had a concern about ---

THE COURT: (Interposing) Yeah,  
Monday afternoon.

MS. POPE-STARNES: We had a concern  
about whether or not there would be sufficient  
with the Court's criminal call in the afternoon.

THE COURT: Yeah.

MR. WHITE: And, Judge, there is no reason why if we should linger on with the Jury Instructions Monday to be here and I know you are conducting your criminal call.

THE COURT: No. As a matter of fact I am respectfully directing both of you on Monday lunch time and after lunch work on the Instructions.

MR. WHITE: I will stay.

THE COURT: With Miss Gerlick will be available in the afternoon, talk to her and then if rulings need to be made we will squeeze it in when we can. Okay.

All right. Thank you.

Have a good weekend.

THE CLERK: All rise.

(Whereupon the matter was completed and recessed for this day.)

\* \* \*

CERTIFICATE

STATE OF MICHIGAN )

SS

COUNTY OF OAKLAND )

I, **Lynn E. Erickson**, Official  
Court Reporter for the Sixth Judicial  
Circuit Court, State of Michigan, do  
hereby certify that the attached is a true  
and correct transcript of the hearing held  
in this matter.

  
Lynn E. Erickson      CSR-0188